IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS, et al,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Case No.:
	§	4:20-cv-00957-SDJ
GOOGLE, LLC,	§	
	§	
Defendant.	§	

MOTIONS TO DISMISS
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Thursday, April 18, 2024; 1:37 p.m.
Plano, Texas

APPEARANCES OF COUNSEL:
(Continued on page 2.)

FOR THE PLAINTIFF STATES:

Zeke DeRose, III
THE LANIER LAW FIRM, PC - Houston
10940 W. Sam Houston Parkway N.
Suite 100
Houston, Texas 77064

Jonathan P. Wilkerson
THE LANIER LAW FIRM
6810 Cypress Creek Parkway
Houston, Texas 77069

****

GAYLE WEAR, RPR, CRR
Federal Official Court Reporter
7940 Preston Road
Plano, Texas 75024
gayle_wear@txed.uscourts.gov

FOR THE PLAINTIFF STATES:
(Continued from page 1.)

Ashley C. Keller
Daniel Backman
KELLER LENKNER LLC
150 N. Riverside Plaza, Suite 4270
Chicago, Illinois 60606

Geraldine W. Young
NORTON ROSE FULBRIGHT US LLP - Houston
1301 McKinney, Suite 5100
Houston, Texas 77010-3095

John W. McBride
NORTON ROSE FULBRIGHT
1045 W Fulton Market, Suite 1200
Chicago, Illinois 60607

James Lloyd
Trevor Young
STATE OF TEXAS, OFFICE OF THE ATTORNEY GENERAL
ANTITRUST DIVISION
300 W. 15th Street
Austin, Texas 78701

FOR THE DEFENDANT:

R. Paul Yetter
Mollie Bracewell
YETTER COLEMAN, LLP - Houston
811 Main Street, Suite 4100
Houston, Texas 77002

Eric Mahr
FRESHFIELDS BRUCKHAUS DERINGER US LLP
700 13th Street NW
Washington, DC 20005

Robert John McCallum
FRESHFIELDS BRUCKHAUS DERINGER US LLP
601 Lexington Avenue
New York, New York 10022

Justina Kahn Sessions
KEKER, VAN, NEST & PETERS LLP - San Francisco
633 Battery Street
San Francisco, California 94111

ALSO PRESENT:

David T. Moran, Special Master
JACKSON WALKER LLP - Dallas
2323 Ross Avenue, Suite 600
Dallas, Texas 75201

Roger P. Alford
UNIVERSITY OF NOTRE DAME
3119 Eck Hall of Law
Notre Dame, Indiana 46556

Lauren Vaca
Sara Salem

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April 18, 2024 1:37 p.m.

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P R O C E E D I N G S

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THE COURT: Good afternoon. You can be seated.

MR. YETTER: Good afternoon, Your Honor.

THE COURT: All right. We're back this afternoon on cause number 4:20-cv-957, The State of Texas, et al versus Google, LLC. And we're here on two dismissal motions this afternoon. We're here on two dismissal motions this afternoon. We have a 12(b)(1) motion, filed by Google, and a 12(b)(6) motion. As I advised you all this morning, we're going to take up the 12(b)(1) motion first.

I didn't mention it this morning but as with all our hearings, we also have our audio-only feed going out so the public is able to hear this hearing.

And so we've already had appearances from counsel this morning, but why don't I get appearances for these motions for who's going to argue for the plaintiffs and who's going to argue for Google.

MR. KELLER: Good afternoon, Your Honor. Ashley Keller. I'll be arguing both motions for the plaintiffs.

THE COURT: Thank you. And for Google?

MR. MAHR: Good afternoon, Your Honor. Eric Mahr. I'll be arguing the 12(b)(1), and my colleague, Ms. Sessions,

will be arguing the 12(b)(6).

THE COURT: All right. So since these are Google's motions, Mr. Mahr, we're on the 12(b)(1), and you will be able to provide your argument.

What I'm going to do is set about 20 minutes for each side, generally. But if we need more time for questions, we'll just go forward as long as we need to. But at least for initial presentation, I want to give each side 20 minutes. I'll have Ms. Sanford keep an eye on that for me.

I will note that I've read all of the submissions of the parties. And so, Mr. Mahr, you can proceed at this time.

MR. MAHR: Thank you, Your Honor. And I, just to admit -- mention, in the beginning, that because I have a deposition in this case in New York starting tomorrow morning, I may be leaving before the end of the second motion. But I will be sure to stay here for the motion I'm arguing.

THE COURT: Understood.

MR. MAHR: So we've been spending a lot of quality time together today, maybe intense quality time, and I thought in the spirit of peace, collegiality, and good fellowship, I'd start my argument with what I think we agree on. Both sides agree that Plaintiff States are bound by

Article III standing requirements just as any other party. And both sides agree to the States' ability to maintain this case in federal court, it depends on their ability to establish Article III standing with respect to their federal antitrust claims.

Both sides have to agree that to establish Article III standing, the States must show injury, an injury in fact, that is fairly traceable to the conduct complained of and redressable by favorable judicial decision. And I don't think either side contests that injury in fact, according to the Supreme Court, means, quote, an invasion of the legally protected interests which is concrete and particularized and actual or imminent, not conjectural or hypothetical.

And finally, we agree that the States here are asserting two types of injury in fact, a direct injury to their sovereign interests, sovereign standing, and injury to their claimed quasi-sovereign interests parens patriae. So that's something. We agree on that much.

But we then part ways, and I'm going to focus on three ways we part ways. The first is not really a legal issue per se, but we think it's a really important part of the context for this motion. And there was a lot of discussion in the briefs about it, but we think it's important to address, and I'll try to be brief, the States' inability over the last six months to articulate the capacity

in which they're coming before this Court. And I think that failure is telling because we have OAGs from 17 states, we have excellent, five or six, firms representing them outside; they have had three years and five complaints and a year-long investigation; and yet, still we're having shifting representations about how they're -- in what capacity they're appearing. And I'm not talking about interrogatory answers, about remedies. I'm talking about statements in this Court.

You will recall, in November, I asked plaintiffs to state for once and all in what capacity they were bringing this action, and Mr. Lanier stood up and said, "parens patriae. All of the above"; Google knows this. And then just three weeks later, he told you that actually only 5 of the 17 states were coming under parens patriae. And he went further than that and told you that "Mr. Mahr complains because of the parens patriae issue and the way we have narrowed and ferreted that down. And we have. We have been very careful. Now, Texas at this point has a policy in the AG's office where they are not pursuing things," like this, "under parens patriae," end quote.

And we asked plaintiffs for a copy of that policy, and got none. Apparently doesn't exist. It didn't exist because, weeks later, all of the States are back to parens patriae.

So at the end of the day, you know, I think all

that really matters is that in the complaint they allege sovereign standing and quasi-sovereign interests parens patriae. So all of this switching back and forth, we'll stick with the complaint, but I think it really does show the extent to which this has been a moving target in this case. And I'll tell you a little later why we think that matters.

I'm going to take the sovereign standing first, of the two. And we all agree that sovereign standing is a direct interest to -- injury to sovereign interests which are defined in *Snapp* as the state's interest in the creation of enforcement of the legal code and the failure of another sovereign to respect the state's sovereignty, such as might arise concerning the main recognition of borders.

The state -- the Fifth Circuit recently made clear in *Jefferson Parish* that that goes well beyond kind of a violation of its code, this interest in the code, and it's not just a violation of the law; it's an encumbrance on that violation. And I don't take the plaintiffs as suggesting that they've been encumbered in enforcing their state code. That's the first prong. I also don't see them, as allegedly Google has, encroached the riparian rights or threatened their borders in any way. We searched the complaint diligently and found nothing. So we, therefore, think sovereign is out.

And I'm not sure, reading the brief, whether

they've even intended to assert a sovereign interest. But I think it's important in this case that the Court very carefully pick apart the various bases for Article III injury in the case and rule on each of them. And we think that's important because, for one thing, as I just said, previously the States said that they were abandoning their parens patriae claims, and now they're back. And we don't know whether that will change again in the future.

And I think that's another -- another important aspect of this is we think the States have used their federal antitrust claims in this case primarily, if not exclusively, as a jurisdictional tool to choose the forum they wanted. They've used it to open the door to this Court to this kind of tangled array of DTPA claims, which all have slightly different requirements in terms of scienter and in terms of what kind of conduct is violative and not.

And it appears to us the goal now is to try to kind of reinvent this antitrust case as a DTPA case and, as Mr. Yetter spoke about earlier today, a concern that that's going to result in this last-minute effort to extend the discovery deadline that we've worked very diligently to meet, to do all this DTPA discovery on what started out as primarily an antitrust case.

And we've seen this use of the antitrust -- the federal antitrust laws as a jurisdictional tool back when

Google filed its petition to the judicial panel on the multi-district litigation. Because, if you recall, in response, when we filed that motion, the States threw their damage claims under Section 4C of the Clayton Act overboard because under the MDL statute as it was then, before it was recently amended, the MDL statute expressly allowed damages actions under 4C to be consolidated for trial, not just centralized. And they didn't want that. They wanted to stay in the jurisdiction they picked, so they threw their damages claims over.

And we think, you know, that kind of speaks to the idea that this quasi-state or sovereign interests that they claim in recovering damages on behalf of citizen consumers is a little bit of a specious claim, especially since they can get all the relief they seek under their own state laws.

So all of this to say, as I move on to discuss quasi-sovereign injury, the States' claim they need a federal forum to seek solely injunctive relief that is equally available under their own laws rings a little hollow to us.

So turning to quasi-sovereign interests. First, the test. And just in the last year, as you know, the Fifth Circuit has really paid a lot of attention to this particular prong of Article III standing. And first, in *Louisiana Fisheries* the Fifth Circuit identified two related but distinct quasi-sovereign interests that the state has in the

well-being of its populace. First, a quasi-sovereign interest in the health and well-being, both physical, economic, of its residents in general; and second, a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

Again, I think we could easily dismiss the second one concerning the discriminatory denial of rightful status within the federal system. But I do think it's important to walk through these sovereign points and that prong of the individual points because we're really getting down to -- well, first of all, that emphasizes the importance of kind of federalism concerns in parens patriae entreating the federal court, number one. But we're really getting down to one thin reed left for them, and that is the question about whether they have the sovereign -- quasi-sovereign interest recognizable here in the health and well-being, both physical and economic, of their residents in general. And that's where *Harrison* comes in.

Harrison focuses very much on just that prong. And the Fifth Circuit in *Harrison* makes very clear from the beginning that consistent with the Supreme Court's decision in *Snapp*, this issue of Article III standing needs to be taken very seriously. It explains that *Snapp*, and in *Snapp*, the Supreme Court imposed two what the Fifth Circuit calls hard and fast limits on parens patriae. And I read this as

confirming that the irreducible minimum for Article III standing is not a subject that's important for a kind of superficial hand-waving analysis but, frankly, I think you see in a lot of these district court cases out of the circuit that have been cited where it's not given the kind of attention and care that we see in the Fifth Circuit given it in *Harrison* and what I'm calling the *Louisiana Fisheries* case.

For example, just take the *Microsoft* case. The district court there took the view that the case had already been tried. It went up to the court of appeals, came back to the district judge, and she took the view that the court of appeals, having reviewed and ruled on the earlier opinion in the case, must have by necessary implication considered its subject matter jurisdiction and determined *sub silentio* that it had jurisdiction. And I think if there's a message from *Harrison*, it's that Article III standing under parens patriae is not to be addressed *sub silentio* or by implication, but it imposes hard and fast limits that must be carefully considered and enforced.

In fact, at page 759, the Fifth Circuit says, quote, "For parens patriae suits, States must do more than meet Article III's irreducible minimum. They must assert a quasi-sovereign interest apart from the interest of" private parties -- of "particular private parties." And I know the

Court is well familiar with these cases, but I do think it's worth --

THE COURT: Right. Speaking of the case you were just talking about, you were talking about *New York v. Microsoft*; is that correct? That's the one you --

MR. MAHR: Yes.

THE COURT: -- were just talking about that had come back down. So if I'm right, that's 209 F.Supp2d 132. That's the one you're talking about?

MR. MAHR: Yes, on --

THE COURT: Yeah. So it does seem to me that judge said a little bit more than what you just referenced, though, about parens patriae standing, did she not?

MR. MAHR: She said a little bit more, but I think in the end, what kind of -- and I think this is a kind of a characteristic of each of these cases that there are a lot of circumstances that come together that result in a particular ruling, and none of those circumstances are clear.

THE COURT: I'm going to come back to that case with you --

MR. MAHR: Okay.

THE COURT: -- and some others. So you can continue.

MR. MAHR: Okay. So as I say, the kind of analysis, and there might be a lot of kind of -- I read those

cases -- and we'll talk about them individually, of course, if you want to -- but as a lot of common sense practicality, that the case has been tried, it's gone up, it's come back. The Court of Appeals looked at it. Those guys are smart. They wouldn't look at it if it didn't have subject matter jurisdiction, implicit *sub silentio*. And other courts do this all the time. So we'll just let it go. And that's, again, the kind of what I'll call hand-wavy, this happens all the time, that I think the plaintiffs are asking you to do here. And instead, I think the Fifth Circuit has said in these last two cases, no, not with respect to injury in fact, in particular, when quasi-sovereign interests are at stake. So going back to the *Harrison* court.

And do you call it *Harrison* court or *Jefferson Parish*?

THE COURT: I'm happy to go with whichever, however you want to refer to it.

MR. MAHR: Okay. I'll call it *Harrison* because there's another *Jefferson Parish* antitrust case, and I don't want to get them mixed up.

So in Harrison, the Fifth Circuit said to invoke parens patriae, a state must show that this quasi-sovereign interest is sufficiently concrete to create an actual controversy between the state and the defendant. And that was the issue there.

The second prong is does it affect enough people. And that was not as big of a point in the -- in the *Harrison* case. And I don't think it's big as a point, at least of our focus, in this case either. As in *Harrison*, we focus on this first prong of what is a conjunctive set of hard and fast limits. And the Fifth Circuit tells us three things about this quasi-sovereign interest in the well-being.

First, it has to be articulated apart from the interests of particular private parties. Second, the Court explains at 773, present in *Snapp* but missing here is an injury that emanates outside the state's authority. It's something the state can't get to on its known, so it needs to be resorting to the federal court. And third, relatedly, the Court talks about how, quote, "The vindication of Puerto Rico's interest in protecting its citizens against discrimination from a state could only occur in federal court, and no such federalism concern was present in *Harrison*." And it identified that as an important factor.

And I'll take those in reverse order and apply them to this case. Obviously, you don't have a federalism concern here that could only be addressed in this federal court. Google's alleged conduct, if it violates the federal law, it violates the state laws that are based on that federal law. And so no state claims if there's any material difference, and no state claims that it could not obtain the same

injunctive relief in its home state court that it can -- it seeks under the federal antitrust laws.

There might be an exception with Arkansas that Ms. Sessions will talk about. But by and large, that answers the next factor, too, that there's no injury here that emanates outside of the state's existing state sovereign authority. It already has the ability to do everything it needs to do with respect to this alleged conduct under its own laws -- each state does. So they don't, therefore, require any access to the federal courts like in -- like *Harrison* explains was important in *Snapp*, is it important in general in this area.

So I think those two failings are enough alone under *Harrison* and *Snapp* to close off the quasi-sovereign parens route to standing in this case, but the remaining factor further underscores and supports that result. As we read the complaint, the States' attempt to assert the injuries of three different sets of private parties as the bases for their own injury in fact. Two groups, they're almost the same -- at least how we treat them -- publishers and advertisers, and that's what you see across the complaint, even in the brief. Every mention of harm -- nearly every mention of harm says publishers and advertisers; publishers paid more, advertisers paid more. And then the third group is this amorphous group of citizen consumers of

goods and services in each of the 17 states.

And I think it's a little bit of a three-bear situation where one's too hot and the other's too cold. Publishers and advertisers, that seems paradigmatically private interests that don't become state interests just because the state jumps in. The publisher/advertiser interests are purely commercial, and they're being vigorously pursued in the Southern District of New York by very competent class counsel, and individual cases. They don't need the States' help in those cases. And, in fact, having those claims addressed here -- publisher and advertiser harm addressed here while it's also being addressed in the Southern District of New York, if anything, creates a risk of conflicts and inefficiencies.

So that brings us to too-cold, citizens of -- citizen consumers of goods and services. Without limitation, this means anyone who bought anything in Texas or Alaska or Arkansas, or any of the other states, is part of this citizen consumers of goods and services. This is the antithesis of the kind of concrete and particularized injury in fact required. It's hypothetical, abstract. And it's completely contingent on the competitive contentions existing in each of the 17 states for each of the goods and services that these citizen consumers buy. They just kind of assume that there's been a pass on of whatever overcharge they alleged took place

at the digital advertising level, and that's been passed on to someone who buys a toaster in Puerto Rico. And you can't make that supposition without looking at the market for toasters and see whether toaster producers and toaster sellers even have the ability to pass on costs.

Pass on doesn't happen automatically. You have to have some level of ability to pass on those costs. And you have to do that for literally every single product or goods and services purchased by anybody in these 17 states in order to determine any kind of concrete injury. And that, to me, is just so hypothetical, theoretical, and abstract that it can't substitute for the kind of concrete and particularized answer -- harm that's required in *Harrison*.

So in the end, the States are claiming to have suffered this concrete and particularized injury to a quasi-sovereign interest, and that gives them an interest in having a completely redundant claim for injunctive relief in federal court, and they're then using that federal claim to open the door to a raft of 17 different DTPA claims.

And now, as we look at the -- both the rulings in the two Fifth Circuit cases, and in *Snapp* before that, we don't think that's what *Harrison* envisioned or the Fifth Circuit envisioned at all. Again, the Fifth Circuit very carefully laid out the requirements for parens injury in two different cases just in the last year. And in those cases,

the Court stressed hard and fast limits, required the States to show more than Article III irreducible minimum and, in particular, interests that implicate federalism concerns resulting from harm that goes beyond what the States can address themselves. And that's why we think it's inappropriate in this case.

THE COURT: Thank you, Mr. Mahr. I'm going to want to visit with you a bit about some of these cases before we hear from your friend on the other side, Mr. Keller.

So let's start with *Harrison*. I think you have aptly focused on a lot of very important parts of the opinion, including standards that the Fifth Circuit laid down. In that case, as you know, we have a school board, and you have the state coming in and saying the school board is essentially not following state law. And I think another passage in that opinion that is telling about what was going on in that case is what Judge Willett winds up with in Roman IV where he says Louisiana essentially seeks to bring an enforcement action in federal court against a subordinate largely for violating state law.

And he says this is the same as the cases, the Sixth and Seventh Circuit cases, that are discussed in the opinion in both of which cases -- the Sixth Circuit one is the *Saginaw* case -- similar claims failed. And he then says, "The federal courts do not sit to resolve injury or disputes

among state officials over the bounds of their authority under state law," quoting another court. And he says, "Why, because it's not the role of the federal courts to govern the states; that Louisiana stands fully capable and ready to enforce its laws."

And so I think part of what he's saying is going on there is you have a school board that's got a policy for, what was it, roughly 50,000 students in the entire State of Louisiana. And so it seems to me that the state in that case didn't have a very good case, certainly under parens patriae, for something that a policy or a problem that was going to affect a substantial part of the population; it was one school board. And the conclusion was that the state had not met requirements for parens patriae standing.

As you know -- we will talk about the *Fisheries* case. The *Fisheries* case is at a different stage than this case; it was at the summary judgment stage. And as you will recall, the parens patriae finding in that case turned virtually entirely on the fact that Louisiana had failed to come forward with evidence showing that the shrimp-fishing industry in Louisiana had suffered any harm. That was basically the bottom line of that part of the parens patriae part of the opinion. As you know, in that case the state was trying to assert some other grounds for standing.

So I think both of those cases are important and I

do think they're important in setting parameters for this Court's analysis. And I agree with you that the Fifth Circuit is certainly articulating that, as you put it, we don't want to be doing a hand-waving analysis of these issues. But I do want to ask you about three cases, one of which you touched on, that I think I'd like to hear what you have to say about them.

The first one is the *New York v. Facebook* case. I'm just going to say D.D.C. for this; it's obviously Federal Court District of Columbia. This is a case where you have a coalition of 46 States suing Facebook for antitrust violations under the Sherman Act. And as you know, in that case the Court found that *parens patriae* standing was present.

And I'm going to just quote to you from part of the opinion. At page 23, the Court says that "Plaintiffs have properly pleaded sufficient injury to the quasi-sovereign interests in the economic well-being of their states. Their Complaint alleges that Facebook has prevented, through anticompetitive means, the emergence of viable competitors to its monopoly and Personal Social Networking Services. As a result, millions of Plaintiffs' citizens have experienced 'reductions in the quality and variety of privacy options and content available to them in the market,' which is to say that, on the States' theory, millions have experienced a rise

in the effective price of using Facebook." It also then goes on to talk about effects on small and medium businesses.

The Court then says, and it says, "Although these allegations are a shade vague, the Court finds them enough to at least satisfy the pleading requirements for *parens patriae* standing in the context of asserted antitrust violations."

And if you'll bear with me, I'm going to go through each of these cases and then have you comment because I think there's at least some similarities among them, and I would rather you hear all of them and then comment.

MR. MAHR: Appreciate that.

THE COURT: The second one is one you alluded to, again out of the DDC, the District of Columbia federal court, the *New York v. Microsoft* case. This is a case that, as you know, has got a rather complicated procedural history. You have 19 states. You get a judgment that goes up to the D.C. Circuit, it comes back down. And you have I believe it's nine litigating States that haven't settled, and you have *Microsoft* challenging their standing under *parens patriae*.

And this is the one where I think you talked about the district court maybe not saying that much, but I will note that there is -- you know, there's a few pages of analysis from, you know, about four to five pages total I think, and the Court does note a couple of things that I think bear on some of the points you were making, one of

which is that in that case *Microsoft* I think at two levels was pointing to the fact that there is a problem when you have a number of states alleging the same kind of injury; it's like this isn't sufficiently specific to that state. And the Court at two levels rejects that argument. It rejects it at the Article III level, at footnote 22, noting that "For Article III purposes, the breadth of the injury among the several states is not relevant as limitations on the claims for broadly felt injuries are not constitutionally based."

The Court also rejects that argument, I'm going to call it sort of the prudential standing level, and says the following: "While certainly a state alleging injury must establish that its own citizens have suffered some injury, none of the cases cited by *Microsoft* hold that *parens patriae* standing should be denied where the injury is felt by the citizens of other states." It then cites a number of cases.

"Indeed, such a requirement is undermined by the Supreme Court's acknowledgment in *Hawaii v. Standard Oil* that, quote, 'the United States government, the governments of each state, and any individual threatened with injury by an antitrust violation, may all sue for injunctive relief against violations of the antitrust laws, and they may theoretically do so simultaneously against the same persons for the same violations.'" And, of course, that is quoting

directly from the United States Supreme Court.

It goes on and provides -- it says, "Moreover, if the Court agreed with Microsoft's reading of the law, a state's right to bring suit as *parens patriae* under the Clayton Act would be nullified where the harm sweeps broadly across the states. In such a situation, the individual states would have to rely solely upon the federal government to bring suit to cease the harm. This result runs contrary to the well-established principle that suits by a state *parens patriae* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the Antitrust Act." So this is all from that opinion.

And then on the next page, the court walks through why it believes there was sufficient, if you will, injury that was brought out in the case. And the conclusion is, "At a minimum, this is a case where the direct impact of the alleged wrong is felt by a substantial majority, though less than of all the state's citizens, so that the suit can be said to be for the benefit of the public." I'm not giving you the whole paragraph; that's partially because there are several opinions preceding this that talk about the Microsoft products, et cetera, et cetera, that are involved. I know you're well familiar with that. And so that's another case that I think I would like to hear you address. But I am

going to put a finer point on this in a moment in terms of this case compared to the cases I'm talking to you about.

The other case -- and these I think are all cases probably cited by both parties. I know they're cited by the States. The other one is the *In Re Electronic Books* antitrust litigation out of the Southern District of New York. And again this is a case where you have a coalition of states suing for federal antitrust violations. This is one that includes Apple, and I think Apple is the only remaining defendant. And Apple, I think rather late in the game after getting an adverse decision, came back and said, Wait a minute, there's no standing; they don't have *parens patriae* standing.

As you know, the Southern District of New York disagreed. And in that case, it had to do with I believe some price fixing on books, and the Court's ultimate conclusion was that there was a sufficient injury to the residents, the citizens of the state, who were subject to basically the effects of this price fixing, to support *parens patriae* standing. Again this is, you know, we have -- in each of these, we have groups of states.

I will be asking Mr. Keller about this, because the point you made that it seems to me gets to the heart of this of the *parens patriae* issue is your point about the primary entities affected, based on the conduct that's been alleged

against Google, are publishers, advertisers, others in this industry, but the Plaintiff States have alleged, as you've noted, that the harm goes beyond that to the consumers. And so the question becomes are those allegations sufficient to get them to *parens patriae* standing. And what I mean by that is are they sufficient to articulate a harm to enough of the populace and that is not, if you will, too speculative -- we're at the motion to dismiss stage -- to support *parens patriae* standing in this case.

And I will note that in the current amended complaint you have, amongst the other portions of it, paragraphs 502 to 525 go through in detail the anticompetitive effects, and they don't just talk about publishers, advertisers, et cetera. They do have paragraphs and sections that talk about the, if you will, the injury that then resulted to consumers.

And so I'm not going to read you chapter and verse of those -- I have a feeling we may hear some of that from Mr. Keller, we may not -- but to me the question, the important question here, is whether or not those allegations of harm going through to consumers are sufficient. It's not the only question here. But I would like to hear your reaction to those three cases.

MR. MAHR: That's a pretty straightforward, easy one. I think I'll try to take them all together. And if you

want me to break them apart, I can, but -- and you'll know this one. The number one is those are out-of-circuit cases decided before *Harrison*. And I don't mean ignore them. I mean, I don't think they would be cited the same way in those courts if those courts were bound by *Harrison*. Judge Boasberg, fantastic judge in the D.D.C., thoughtful judge, was applying a 1976 case called *Kleppe*, which is kind of the standard case in the DDC. That's not the law in the Fifth Circuit. And these plaintiffs have fought mightily to change the law in order to come back down here, and they should be bound by the law that they've come to.

Secondly, very odd procedural postures in those cases. As you said, two were post trial. One at the relief stage, Apple; and one post appeal with Microsoft. And I dare say that judges can -- district court judges are often practical as well as right on the law. And I think, you know, the idea that after these massive cases have been going on, when all parties are in the federal court -- not in this very unusual situation here where we have the same case, because of the procedural transfers, same case pending in three different districts -- here, Southern District of New York, and Eastern District of Virginia. In those cases, everybody's in the same court. And a lot of cases previously said the states have an interest in enforcing the laws, too. And I think that judges can be practical when everything

could be resolved at one time after trial, after appeals courts. And I just think that's something we have to consider in those decisions.

I also -- I agree with you there's a number of pages, in particular the *Facebook*, Judge Boasberg paid attention to the issue. Although, I think she pays a little bit more attention to the number of people affected than the nature of the injury in fact, which is where *Harrison* really drills down; what is the nature of that injury in fact, in that interest -- that quasi-sovereign interest. Because the rest of these cases just kind of say general interest in protecting competition, that's enough and there are enough people.

And I do think in *Microsoft*, though, she spent a few pages on it at the end, the idea that the court of appeals had already looked at this weighed heavily, as I read her decision. But you mentioned --

THE COURT: Can I ask you a question? I want to ask you a question because you're talking about Fifth Circuit precedent. And I don't know that I'm reading the two Fifth Circuit cases to be articulating any kind of new or different standard, and I don't know -- I don't think you're saying that, but I think they are applying Supreme Court decisions like *Snapp* and that have been out there for a while, but they're applying them to those particular circumstances.

So part of what I'm coming back to is I don't know that those Fifth Circuit cases are breaking new ground so much as they're saying we're going to rigorously apply the standards that are here to the facts in our case. And the facts in the *Jefferson Parish* case I think are pretty clearly not going to come close to meeting *parens patriae* standing based on the circumstances there.

And then, you know, the *Fisheries* case is interesting to me in one sense because, you know, there's some discussion in that case about the motion to dismiss stage, and this is being, you know, poured out at the summary judgment stage. And the notion there, which is interesting to me, is it appears that there is implied acceptance from the Fifth Circuit potentially that if the state had come forward with evidence of harm to the shrimping industry in Louisiana, they might have gotten to *parens patriae*. I'm saying that's not clear. But the opinion basically says you had your chance. You put on no evidence of the shrimping industry -- I mean, I can see the argument being is that really -- is that significant enough to get you to *parens patriae* standing, but it looks like the Fifth Circuit might have said yes, if they had put on that kind of evidence.

And what I'm coming to is this case, in terms of the factual background, the technology, what's at issue, looks a lot more like the three cases I'm talking to you

about than it does the factual background of the two Fifth Circuit cases. Do you see my point?

MR. MAHR: I do. So to the general point you mentioned first, I agree with you there's no new law here. There is -- as I think courts of appeals do from time to time say, there's been a drift since *Snapp*. It's been 40 years. And I think they actually go back and have a truer application of *Snapp* than I think you see in these other antitrust cases where they're saying it always works this way; the states always sue; private parties come in. We have it all in one place. Let's not rock the boat, let's keep rocking with it. People always say the magic words and we let it go forward and solve the problem.

I think the Fifth Circuit is saying they could resolve the *Harrison* case just on the final paragraph, Roman IV, that you mentioned. This is purely interstate. Why do we have to go back and say this is more than the irreducible minimum, this is concrete and particularized, and this is hard and fast limits. And things have drifted and we need to tighten it up. That's how I read the two decisions.

And in *Fisheries*, I agree with you, that I read it as if they had shown that there was harm emanating outside -- in the form of federal government regulation outside of Louisiana affecting interests inside Louisiana. Well, that's exactly consistent with all that they're talking about when

they were explaining that these are federalist concerns, and here is a force outside. You can't go to a Louisiana court and say, "Hey, the federal government is telling me to put on this turtle catcher on the front of my trawler. Can you stop them to do it?" The Louisiana state court can't do it. You've got to be in federal court there. As opposed to *Harrison* where you've got all you need in federal court -- in state court for the government of Louisiana to handle, to deal -- the OAG of Louisiana to deal with the school districts of Louisiana.

I would also say though about Louisiana's injury -- I mean, about the general harm, I think 52,000 students is not an insignificant amount. And they haven't put a number on the amount of advertisers here. But at least there, they had two examples of it really happened to these two, and there are 52,000 others that it could happen to. We have nothing in the complaint that it really happened to anybody. This person bought a toaster, and it cost them a micro cent more because of some -- there's nothing because you can't measure that.

THE COURT: Right. But I also didn't see any concern that, you know, my goodness, we're going to have school districts all over Louisiana doing something similar to this. And, certainly, there had been time to see if that would have developed. I mean, I hear your point, but I think

that part of what the Fifth Circuit was saying in that opinion is this is one school district. It has to do with these two kids. But basically that's why in Roman IV he's saying you're dealing with one school district that you're saying is not following state law, and that does not sound like the kind of issue that you need to come and bring to federal court.

And, you know, in both of these cases, obviously we don't know hypothetically what changed facts might have done to those decisions. But, you know, it does seem to me that one of the things we have to reckon with in this case is the subject matter that the Court's dealing with here looks different than the subject matter in those cases. And those other technology cases, again subject matter wise, look more similar to this case.

I hear your point about the Courts -- the way that the Court applied precedent and the way that the Court applied *parens patriae* doctrine in those cases may not have been sufficiently rigorous. But my point is when we're looking at context of courts that have looked at at least analogous, somewhat analogous, factual background, those cases I think are meaningful as well.

MR. MAHR: Certainly meaningful. And I get it completely that we've got the kind of cases that are factually more similar outside of the circuit in other

district courts, just district court decisions, versus I think very meaningful direction from the Fifth Circuit but not on facts that are exactly the same. But I would say, even as you described it, you said in *Harrison* it's not the kind of case that seemed like it needed to be in federal court. And that's kind of our point here, that a case where the only thing they're seeking in federal court is an injunction that they could equally get in any other state courts doesn't seem like the kind of case that needs to be in federal court.

THE COURT: Well, neither of them were antitrust cases either. I mean, maybe -- the *Fisheries* case does have to do with the federal government. And, by the way, we have footnote 5 that talks about a serious problem under *Mellon* that they could have had, you know, but the Fifth Circuit didn't even look at that. But the *Harrison* case is certainly not an antitrust case. And does that not make a difference?

MR. MAHR: The fact that -- I think it makes a difference on the facts, but I don't think that means that the explanation of the law and the importance of the federal interests and the -- what they pointed out, going back to *Snapp*, which again I think these Fifth Circuit cases are more a reconfirmation of *Snapp* and we're going back to the beginning rather than making new law.

THE COURT: Speaking of the beginning, let me just

come back to the *Hawaii* case that's cited by the Court in *Microsoft* and that language that says, you know, you can be the United States Government, it can be the government of each state, it can be all of the above, can sue for injunctive relief for antitrust violations, and they can do it simultaneously against the same parties. And I'll note that *Hawaii* is, you know, this is our citizens are going to pay some more for petroleum products or something like that; right? I mean, it's *Standard Oil*, and it looks like they're going to pay some more for petroleum products. I don't know that some of your same arguments couldn't have been made in that case. And, you know, we have the Supreme Court endorsing, you know, a *parens patriae* cause of action.

MR. MAHR: And I do understand that, and I think it's obviously true that all of those people can sue together, but we still need an injury in fact analysis. They can't do that without an injury in fact, and that's what we examined under the facts of this case.

And that's my final point about those three cases you mentioned, is I do think there's an aspect of this where the injury to the citizen consumers in those cases was far more direct, far more concrete and particularized. If ebooks -- so understand our -- lots of people buy ebooks and that harms our citizenry. They directly bought ebooks from the -- from the defendants. And same with generic medicines.

And there was also even a recognition in the Eastern District of Pennsylvania case on generics, about the importance of medication to the citizens. Social networking sites -- the same thing -- they're getting them from Facebook, not from others.

And that's not to say -- and I think there might be some misunderstanding that *Illinois Brick* bars this, but it talks -- speaks to the, is this a concrete and particularized injury. And we think when you get to the point where anybody who bought anything in the entire state could have had a milli- -- a micro cent, or a very small percentage, of their price increased, maybe if the seller of that good was able to increase, pass on, the advertising costs for the virtual advertiser, maybe not, I think is another difference. And there's that big jump from the harm of direct purchasers, but it's absolutely concrete stepping into the shoes of people who are already represented versus it is completely diffuse citizen customers, citizen consumers.

THE COURT: No, I don't disagree with that. I think that's -- as I mentioned earlier, I think that's the issue here is that you have -- in these other cases you have the direct purchasers or the consumers, if you will, who are being directly impacted, whether it's through Facebook's social networking or, for that matter, *Hawaii*, the purchase of those products, or Microsoft products in the *Microsoft*

case, that these are the direct purchasers. So that's why I was referring to earlier that here you have an additional step, right, that --

MR. MAHR: I think more than an additional step. They're not any longer purchasers of advertising. It's just everyone who might have been affected, like a purchaser of a bottle of water is a purchaser of petroleum. I mean, maybe you can still say that's somewhere down in the chain of indirect purchasers, but I think it even goes beyond that and it just becomes completely remote and speculative and no longer suitable for injury in fact.

THE COURT: All right. Thank you, Mr. Mahr. We'll hear from Mr. Keller.

You can proceed.

MR. KELLER: Good afternoon, Your Honor. May it please the Court. Ashley Keller on behalf of the Plaintiff States.

You're being asked through Google's 12(b)(1) motion to find that you don't have a case or controversy in front of you under Article III of the Constitution. But this is the quintessential case or controversy that has been adjudicated by federal courts on the merits for the over 100 years that federal antitrust laws first entered the statutes at large.

There are lots of different ways to see that you have Article III jurisdiction, but I'll start with admittedly

the one that has the most precedent and I think is the easiest, which is *parens patriae*.

Snapp Brothers is the leading Supreme Court precedent on this score and it says quite clearly, and you heard from my friend on the other side -- there's no disagreement on this -- that States can proceed *parens patriae* to assert an injury to a quasi-sovereign interest where the physical or economic health of their citizens is at stake.

Now, the prototypical example of the harm to the physical health of a state's citizens would be a pollution case. If Google were polluting a river, there's really no dispute that the states could bring a suit as *parens patriae* in federal court and allege quasi-sovereign injury in fact. That would be true, even though boaters and fishermen and baiters would be directly harmed by the pollution that Google was committing in the river, because the downstream consequences of that pollution, literally and figuratively, would affect a large number of citizens and it would be diffuse. And that would be true even if the States could regulate under their own state laws; right?

The States wouldn't be limited to bringing claims under the Clean Water Act or claims under CERCLA. They could bring their own state public nuisance cause of actions or any positive statutory law that the legislatures of the states

have enacted to protect the health of the citizens from a physical perspective.

THE COURT: Mr. Keller, though, in the example you're giving, and obviously we know that there's cases out there that have the similar kinds of facts that date back, but in that type of case you have a lot of people, probably citizens, who are being directly impacted.

MR. KELLER: Absolutely, Your Honor. That's a good segue to our argument, respectfully, that this is the prototypical example of harm to the economic health of a state's citizens where the states should be allowed to proceed *parens patriae*, which is why there is an unbroken line of authority from the beginning of the antitrust laws to today where federal courts have adjudicated these sorts of disputes, and not one, not one, authority from the federal system that goes their way and says states cannot bring these sorts of claims under the antitrust laws.

And if you accept the well-pleaded facts in the complaint as true -- and Your Honor stole my thunder, you went to the very paragraphs where we allege this -- Google has a stranglehold on multi-trillion dollar markets for online advertising. And, yes, just like boaters and fishermen in my pollution example, advertisers and publishers are directly impacted by this, and they're suing to vindicate their economic rights.

But it is truly the case that every nanosecond of the day, if you accept our plausible allegations as true, there are consumers, flesh-and-blood people, in these states who are seeing the wrong advertisements for the wrong products for the wrong price. Now, they can dispute all of that at a legal procedural posture, as Your Honor has pointed out, but we're at the pleading phase, and standing still accepts under Article III the procedural posture of this case. This is 12(b)(1), not a Rule 56 motion, and so -- please. Excuse me.

THE COURT: Yes. I don't want to interrupt your train of thought too much. But two quick questions that were raised by your -- by what you were just saying. You know, the first is assume with me for a moment that this was just harm to advertisers and publishers -- if we assume there wasn't any harm beyond that, the only harm we could point to was them. Would there be a problem for the state coming in *parens patriae* in that circumstance on behalf of just advertisers and publishers?

MR. KELLER: I think that would be a harder case, but I still think the States could be here under a *parens patriae* theory, and the reason is there are a lot of advertisers and publishers. And yes, there's an action in the MDL, and there's Rule 23 and the possibility of obtaining relief for a class. But Rule 23 is really tough, as Your

Honor knows, and they are going to appropriately -- I understand why they would do this -- fight quite vigorously to say that a class shouldn't be certified. And so a mom-and-pop advertiser or a mom-and-pop publisher that isn't *The Daily Mail*, that doesn't have the resources to hire Kellogg, Hansen, and all of the great lawyers you're seeing in New York, the States have a right to try to vindicate their interests as well. And the diffuse downstream consequences of Google's anticompetitive misbehavior I think are best indicated by a sovereign in this interest.

And so while I do agree that that would make the case more difficult, I don't think it would strip the Court of adjudicatory authority under Article III of the Constitution. And again, Your Honor has pointed to this, it's not just the consumers, the flesh-and-blood people, although that's a very significant population, and I would say anybody who's got a cell phone or an internet connection would be governed by the anticompetitive conduct we're talking about here. So essentially, every flesh-and-blood person, man, woman, and child in these states, but it also would be competitors.

We document this, too, in the paragraphs that Your Honor highlighted. Competitors who were previously competing in the marketplace but had to exit, or competitors who are now operating in a very different fashion as a result of

Google's anticompetitive misbehavior, so all of that -- or not the publishers and the advertisers who are directly attempting in the MDL to vindicate their rights -- who they are entitled to rely on us as sovereigns to vindicate their rights for them.

And as I noted before, there is not a single solitary case that's controlling that goes their way in the antitrust context, but I would say to Your Honor there is one decision that I can point you to in the federal system that looks like a primer of Google's argument. This is the *Georgia v. Pennsylvania Railroad* Supreme Court case. But it's not the majority opinion, it's Chief Justice Stone's dissent that I would commend to you. It looks exactly like the argument that Google is making here, saying we shouldn't take this case; *Georgia* doesn't have standing to proceed *parens patriae*.

I have immense respect for Chief Justice Stone, but as our current chief justice said just last term in the *Students For Fair Admissions* case, you don't typically look to a dissenting opinion to figure out what the law of the United States is; you're bound by what the majority says.

And what the majority said in *Georgia* was we're taking this case. And we're not just taking this case, we're taking it on our original jurisdiction docket, which is actually a separate point that I would make to Your Honor.

You heard from my friend on the other side that we should go bring these cases in state court; we don't need to be in federal court. I think he's actually unwittingly demonstrated a different way that you could find Article III jurisdiction here.

As Your Honor is keenly aware, Article III specifies the sorts of cases or controversies that federal courts are allowed to adjudicate, and sometimes those cases or controversies turn on the source of law, right, claims arising under the Constitution or laws of the United States, claims in admiralty. Sometimes those cases or controversies are determined not by the source of law, but by the identity of the parties. Think of a diversity case. It doesn't matter that those claims are all under state law. Federal courts adjudicate those all the time when $75,000 is in controversy.

Well, one head of Article III jurisdiction, going all the way back to 1789, are controversies between a state and citizens of a different state. Google is not from any of the 17 sovereign states that are in front of Your Honor. And so what they are inviting us to do is file a controversy between 17 sovereigns and Google, a citizen of a different state. That's something that originally under Article III was something that federal courts had cognizance of. It's actually something that's on a controversial Supreme Court

opinion that you are probably aware of, it's *Chisholm v. Georgia*. It's one of the few opinions that resulted in a constitutional amendment.

Chisholm wasn't from Georgia. He sued Georgia in federal court. The Supreme Court took it as an original matter and said Article III implicitly is waiving Georgia's sovereign immunity, so we have to adjudicate this case on a debt. Congress then proposed, and the states ratified, the Eleventh Amendment saying, no, no, no, no. When the state is a defendant, we're not going to let federal courts hear those cases. They're out of federal court because of sovereign immunity, unless Georgia or the other states choose to waive it. But where the state is a plaintiff, Article III remains intact.

So state versus citizen of a different state is exactly the sort of controversy that can be heard in federal court, and not just any federal court -- the Supreme Court of the United States' original jurisdiction. Now, what the Supreme Court has told us since then is we don't like hearing cases as an original matter like this. We're far better equipped to be an appellate court. So if you have another way to get into federal court, in the district court, go do that, and maybe we'll hear it later on appeal. That's the *General Motors* case, for example. And they've repeated this time after time. There was controversy about whether they

really have discretion to decline these cases as an original matter, going back to *Marbury v. Madison*, but that's what they said, and we're bound by what the Supreme Court has said. We've done exactly what the Supreme Court asked here.

Instead of going into the Supreme Court under the original jurisdiction docket, state versus citizen of different state, we've used the arising -- of jurisdiction, brought antitrust claims that are obviously claims that arise under the laws of the United States, directly in front of Your Honor. That's a different available Article III ground of jurisdiction. But the fact that it's possible for us to bring a state versus citizen of different state claim directly in the Supreme Court of course means that there's a case or controversy here that you have authority to adjudicate.

THE COURT: But do you still need to fit into one of the -- well, the cases discussed has four different potential heads for jurisdiction, but here we have two, we have the sovereign standing and quasi-sovereign standing. The States are not asserting, for example, proprietary standing argument.

And so I definitely understand all of your points about going back to basically the roots of Article III and the fact that we have states versus citizens of another state, but we still have to fit it into one of those,

quasi-sovereign or sovereign standing.

MR. KELLER: Absolutely, Your Honor. There has to be injury in fact. We've --

THE COURT: Right.

MR. KELLER: -- talked about *parens patriae* and injury to a quasi-sovereign interest. I think the Article III head of jurisdiction that they're inviting us to entertain speaks to sovereign interest. I will concede for the Court there's a lot less precedent that's on point there. We don't have something squarely on point for sovereign standing. I don't think they have anything on point for sovereign standing. So the safer course is *parens patriae*.

THE COURT: And let me ask you, on *parens patriae*, because I'm going to get to sovereign standing with you, you had mentioned that, you know, you haven't really seen a case that supports their theory. You said really you just would be looking at the dissent in the *Georgia* case. But what about -- this is a case cited by the other side from 2017, Ninth Circuit -- the *Missouri v. Harris* case? That's a case where the Ninth Circuit rejects *parens patriae* standing, and, you know, it's from 2017.

And I would like to get your thoughts on that case because that's a case where -- I'm sure you're well familiar with the facts, but basically you had California had passed legislation about what kinds of eggs could be sold in

California and how you needed to treat, you know, the livestock involved in that. And I think to assist in the enforcement of that regulation in California, they also had put into effect regulations saying any eggs coming from anywhere else, if they're not coming from manufacturing facilities that abide by our law, they're not going to be able to be sold here. And so you had the egg farmers from a number of states that filed suit.

And that's a case where the Ninth Circuit wound up saying there wasn't *parens patriae* standing, and the discussion, as you know, had to do with, well, the state is really just here for these particular groups, meaning the farmers, and the state really couldn't articulate -- or the states couldn't articulate a sufficient *parens patriae* interest going to a substantial part of the population.

So I would like to get your comments on that. That's obviously a case that goes the other way from the arguments that are being made by the States here.

MR. KELLER: Yeah, absolutely. I think it was also Nebraska, which was a top ten egg-producing state. Correct me if I'm wrong, Your Honor, but I think that was a pre-enforcement challenge, so you didn't see the market impact yet on the price of eggs. So I think that's a relevant distinction.

I will also say, my point stands, that's obviously

not an antitrust case. I'm not trying to say that Article III standing creates special solicitude for antitrust cases, but the types of harm that you see in antitrust cases I think are uniquely situated to support *parens patriae* standing. And it's exactly the sort of thing that we have been talking about here. If you have a monopolist, the impact that that is going to create in a diffuse way to a large population is easier to intuit than when you're talking about something like a pre-enforcement challenge to, you know, how chickens are going to be raised and whether or not those eggs can be sold on California grocery shelves. But it is a case that goes the other way. I think the facts are distinguishable.

THE COURT: Well, to -- and exactly the point you're making about I think the assertions being too speculative. So in that case, part of the problem for the states was that they were trying to predict what was going to happen to the price of eggs. And they had -- they wound up making two completely inconsistent arguments, under one of which the price of eggs would go up in those states, under another of which the price would go down, because if they did not meet the California law, then they were going to have a lot more eggs for that particular state, and the price would go down, which would benefit consumers.

This goes to your point which is that the Court was saying that's just too speculative. The States have

basically outed themselves. This potential harm is so ambiguous and speculative, it can't possibly support this to potential injury to a substantial portion of the public. That brings me to the argument that your friend Mr. Mahr was making, which is his argument is it doesn't look exactly the same, obviously, but that here, when you're talking about the consumers -- and I appreciate the fact that you're bringing up maybe other entities directly affected which are the would-be competitors -- but if the consumers are sort of maybe a step removed, I think Mr. Mahr's point is it's too speculative what the States are asserting in terms of harm. And I would like to get your comments on that.

MR. KELLER: Yeah. So it's not even too speculative to ignore the constitutional context for consumers in states that have *Illinois Brick* repeal statutes to get economic recoveries for themselves. And there's nothing in the antitrust laws that sort of impact the Article III analysis. So *Illinois Brick*, as we point out in our papers, maybe there was or wasn't confusion on this, that's a pure question of statutory interpretation.

Many states, including some that are in front of front of Your Honor, have *Illinois Brick* repeal statutes, so well past the pleading phase could actually recover monetary damages on behalf of consumers in states that choose not to follow *Illinois Brick*, and so I think that's proof positive.

But for constitutional injury purposes, we've done more than we need to, certainly, on the pleading.

THE COURT: All right. You can continue.

MR. KELLER: I think that I've exhausted my prepared remarks, Your Honor. I'm happy to talk about sovereign standing some more, if you would like. I've admitted that there is a dearth of case law on that, so *parens patriae* I think is the easier ground. But --

THE COURT: Let's talk about sovereign standing because this comes back to the point that was made by Mr. Mahr, meaning he focused a little more on *parens patriae*, but the *Harrison* case, you know, lays out very clearly the test for sovereign standing. And it seems problematic for the States under that test because the only part of the test that it seems like the States could meet could be something about being able to enforce their own laws. And I don't know that I see that here. In other words, I look at the test in *Harrison*, which is very clear, and I match that up with what's at issue in this case, and it looks like it's problematic for the States.

And so my question to you is in light of the standards that are clearly sovereign in *Harrison*, how do you get -- how do the States fit into that here to get the sovereign standing?

MR. KELLER: I'll give you my best shot at it, Your

Honor. So *Massachusetts v. EPA* from the Supreme Court, leaning heavily on Justice Kennedy's concurring opinion from *Lujan*, says that "Congress has allowed to depart from the common law default for injury in fact. It can create injuries that wouldn't have been previously recognized." And I think the default is certainly that when there's a violation of federal law, it's for the federal sovereign, an Article II executive branch officer, to go enforce that violation. But the antitrust laws are unique in that Congress expressly desired for the states to play a crucial role in the enforcement of the antitrust laws and to address violations of the antitrust laws. And this case is a good illustration as to why.

The States here are the ones who led the investigation. They filed the complaint. They largely survived a motion to dismiss. And then the United States jumped in and said, yeah, this is a really good piece of work that you've done. We're going to copy you and go to Virginia. And I am casting no aspersions. We're thrilled that the United States has come along for the ride and has recognized the harm that Google is causing to markets, but the States did the leg work for that at Congress's invitation.

And so where you have Congress under *Massachusetts v. EPA* inviting the states to enforce federal law, and you

have precedent going all the way back to *Testa v. Katt* saying that a violation of federal law is a violation of state law because federal law under the supremacy clause is the law of the state, I think in that unique confluence of situations, plus Congress saying exclusive federal jurisdiction, we can't file our federal antitrust claims in state court, they can only be filed in an Article III tribunal, I think all of that suggests that the States do have a sovereign injury.

THE COURT: All right. Thank you, Mr. Keller.

MR. KELLER: Thank you, Your Honor.

THE COURT: Mr. Mahr?

MR. MAHR: Just a few comments, Your Honor. Certainly, if they want to bring a diversity case before the Supreme Court, they can do that.

And I'm focused on this case and the idea that if there is no on-point precedent, it's because this is such a unique situation. And they've got something else that was remarked upon by the *Harrison* court, I think it was, that that says something about the whether they said an interest or not. And this is a unique case in that it's a federal claim being used to get into federal court to bring these 17 state DTPA claims on, seeking only redundant injunctive relief -- nothing else under the federal antitrust laws -- when there are private cases in the Southern District of New York, many of them seeking the exact same relief on behalf of

those same private parties who are not by and large citizens, they're businesses, just as the rivals that they allege have been excluded or weakened are not citizens as much as companies, as opposed to the consumers that they -- the consumer citizens that they claim this kind of indirect harm takes a toll on.

And where there's, as my friend mentioned, a federal case seeking the same injunctive relief again, in three different courts -- in three different courts -- and that's a pretty unique situation, so it brings into more focus can a state by itself bring this redundant federal claim that's being litigated in two other courts on the same facts, can it bring it as solely a claim for injunctive relief and then pull all of the state DTPA claims into it. And as I said, I don't think that's the kind of federal injury in fact that the Congress envisioned -- that was envisioned, the Constitution envisioned, under Article III.

THE COURT: Well, Mr. Mahr, I mean, you may need to correct my memory. Was this the first case filed, and did it proceed in that advertiser or publisher suits, or had some of those been filed? But this was filed in December 2020, and I'm not sure if other suits had been filed yet.

MR. MAHR: Eight months before. There were cases filed in the Northern District of California. In fact, Judge Freeman had ruled already on a motion to dismiss before this

case was filed. And so, I mean, again everybody can bring a case when they want, but there's copycats out there, after copycats, after copycats. But they have no claim to being the first one. And certainly now, under the federal laws, they have no claim to be even the primary enforcer here. So we really think it's the tail wagging the dog.

And finally, I think, you know, when you -- there was a lot of this is the prototypical type and antitrust is a prototypical harm. I don't think it is in this case. I think you could have that argument maybe. And again I think those other cases wouldn't have been decided the same in the Fifth Circuit. But you can have that argument when the citizen consumers that you're protecting in this indirect harm that emanates from the primary violation are direct purchasers of a product because you can identify them, and it is concrete, particularized. That doesn't disappear when you look to the indirect part, concrete and particularized.

And this is -- even the words "hypothetical," "contingent," "ambiguous," and "speculative," I'm not just throwing them out. There is ambiguous harm. Not every person who bought a service for a good in all of these 17 states is going to be able to show or -- that it was even affected by an alleged price increase in digital advertising. It depends on so many -- they are not even indirect purchasers. There are so many steps down, that is really

contingent, and speculative, and hypothetical. And unlike pollution, pollution operates on humans pretty much the same way for all humans, but alleged overcharges in the digital advertising market don't affect every single good and service in 17 states in the same way.

THE COURT: It's interesting. I'm going to have a followup for Mr. Keller, but I would like you to respond just in terms of another fact or aspect of this case that is unique is -- just focusing on the digital advertising and, you know, leaving aside the mobile apps and everything, just digital advertising, the prevalence of exposure to that for all of us on a daily basis, whether it's, you know, on our phones or on our computers online, and being exposed to digital advertising. The ubiquity of that in our lives, do you think -- how do you think that factors in, if at all, in the notion that does that make this comparable in certain ways to alleged conduct that is just going to affect a lot of citizens of the state, whether you want to say it's pollution in the waterway or something like that?

Because I think that's what your colleagues on the other side -- I'll hear from Mr. Keller -- but when we talk about consumers, I'm going to leave aside the other, you know, the entities including the would-be competitors, but it seems like the argument is this is all -- you know, this is part of the fabric of people's lives and most citizens' lives

that they may see every day, that's what I take it to be, because digital advertising is so prevalent. And that therefore, they go from there to say, so if you have these issues that are arising from the conduct of the defendant and that's naturally going to impact these consumers in some of the ways that they've talked about, which is, you know -- at a high level, as you've noted, you know, we're talking about people who are, in my mind, one level removed. I know you think they may be more than one level removed. But I would like to get your comment on that. And I'm going to ask Mr. Keller the same thing.

MR. MAHR: Sure. And I think this runs into another issue that we haven't addressed in this court a lot yet but will, and that's market definition, because it is not all digital display advertising that their case is about. It's a very narrow sliver. In fact, we argue that it's a gerrymandered sliver of just on open web advertisements that are just placed on websites through this ad tech stack.

And I think the facts will show, and they don't plead otherwise, that they're excluding from that mobile in app. So my guess is you see more ads on your mobile device and on apps than you do on your desktop open web advertising. So they cut out search ads because they think they're not subject to -- they cut out video, they cut out mobile app, mobile in app, and all these other kinds. So the ubiquity of

digital display advertising doesn't correspond with the ubiquity of this narrow slice of it that they're talking about here.

THE COURT: All right. Thank you, Mr. Mahr.

So Mr. Keller, I do want to hear from you on just a very practical level this notion of how consumers are being affected and, you know, your theory on that. You've heard Mr. Mahr saying that given the plaintiffs' claims, it may be much more narrow than what's suggested in the pleading.

MR. KELLER: Yeah. Well, the pleading governs, for purposes of the 12(b)(1), we'll stick, of course, with the markets that we've proposed in the pleading. I'm not trying to run away from that. But if a consumer goes to dailymail.com and is consuming the information from that source, they're receiving advertisements. And that's how the publisher makes money. The advertiser is hoping to make money by selling a product or a service to that consumer.

And we're alleging that because of Google's monopolistic practices, they're not necessarily seeing the right ad, or they're paying too much for the product. And, yeah, paying a couple of pennies too much for a toaster, aggregated across all of the citizens of the 17 states who are in front of you, that's real injury that the antitrust laws allow us to address.

And let's remember as well we're seeking equitable

relief. We don't have to necessarily prove the exact quantification of harm that the consumers experienced in dollar terms. We're going to do what we have to do to make sure that fair competition is restored to these marketplaces, and injunctions will allow us to do that when we've proved our case.

THE COURT: All right. Thank you, Mr. Keller.

MR. KELLER: Thank you, Your Honor.

THE COURT: Mr. Mahr, you didn't have anything else, did you?

MR. MAHR: No, Your Honor. Thank you.

THE COURT: All right. So we'll take about a ten-minute break, and then we'll come back and hear argument on the 12(b)(6) motion.

THE COURT SECURITY OFFICER: All rise.

(Recess taken.)

THE COURT: Please be seated.

All right. We're back on cause number 4:20-cv-957, The State of Texas, et al versus Google. And we have heard argument on the 12(b)(1) motion pending, and now we're going to move to the 12(b)(6) motion submitted by Google.

And I believe -- is it Ms. Sessions?

MS. SESSIONS: Yes, Your Honor.

THE COURT: All right. Why don't you come to the podium. And as with the 12(b)(1) motion, I'm going to give

each side about 20 minutes and allow for some questioning.

So you can proceed when you're ready, Ms. Sessions.

MS. SESSIONS: Thank you, Your Honor. Good afternoon. Justina Sessions from Freshfields Bruckhaus Deringer on behalf of Google.

There are a number of issues in our 12(b)(6) motion, but I'm going to focus my argument today on the motion to dismiss the DTPA claims, which I think are sort of the main event for this motion to dismiss.

The state antitrust claims that we've moved to dismiss are I think are pretty well covered in the briefing. And as for the remedies, in their latest advisory, plaintiffs committed that they are dropping all but one of the remedies that was at issue in our motion to dismiss. The only one that's still at issue is Puerto Rico's claim for civil damages. So as I said, with those issues kind of out of the way, I'll focus on the DTPA claims, but I'm, of course, happy to answer any of Your Honor's questions about any of the other grounds for dismissal.

The DTPA claims started out in this case as they often start in antitrust cases, which are kind of state law add-ons to the main event of the antitrust claims. In the first two iterations of the complaint, the plaintiffs didn't include any distinct DTPA factual allegations, although they included DTPA claims. Now, on their fifth complaint,

plaintiffs have added some DTPA specific sections, but those allegations are largely a recycling of the same conduct that underlies the antitrust claims, just crammed into a different legal framework.

The problem for the plaintiffs is that their antitrust claims just don't fit into a DTPA mold; they don't involve consumers or traditional consumer transactions; they involve business transactions in a highly specialized, highly technical context, often with very sophisticated customers such as large publishers or advertising agencies that optimize bidding for a living.

Against this background, it's not particularly surprising that plaintiffs have had to stretch to find a tort hook for this conduct. The fundamental problem with the DTPA claims is that while they might not like the conduct underlying their antitrust claims, there simply isn't an actionable misrepresentation or omission associated with that conduct.

Whether on a Rule 9 standard, a relaxed Rule 9 standard, or the Rule 8 standard, to state a claim, a DTPA claim, the plaintiffs must at a minimum identify the act that they contend is false or deceptive, and plead facts showing why or how that act was, in fact, false or deceptive. And each of the plaintiffs' DTPA claims fails on those two elements.

With respect to the actual statements of Google's that they allege in the complaint, there are no facts pleaded to support inference that those actual statements were false or misleading. And with respect to the omissions, the things that they claim that we did not disclose, plaintiffs' complaint doesn't establish any duty or any circumstance that would make the nondisclosure deceptive; in other words, they don't allege that there was anything that needed to be corrected by the disclosures that they would like to have happened. Instead, and not focusing on the specific statements, plaintiffs fall back to a gloss or interpretation of unidentified statements that they attribute to Google, or things like Google led publishers to believe something, or extolled the virtues of its auction.

This lack of specificity is quite telling in a case that started with a 2019 pre-suit investigation and where that investigation involved dozens of pre-suit interviews with industry participants, only one of whom seems to have identified a single specific alleged misrepresentation that made its way into the complaint. And since that time, it's involved the production of millions of documents. So where the plaintiffs haven't identified a particular statement that Google made, it's safe to assume that they don't have one in mind.

I haven't thought of a better way to structure the

rest of this argument other than to just march through each of the kind of categories of conduct and in the DTPA claims. So with the Court's indulgence, I'll run through that.

THE COURT: One question before you do that. You, at the outset, talked about whether we're looking at Rule 9 or just under Rule 8. But could you talk about the standard here and the standard you believe needs to be applied?

MS. SESSIONS: Yes, Your Honor. We do believe that Rule 9 is the appropriate standard here because the claims do sound in fraud. There are allegations. The allegations are that Google made misrepresentations or made omissions that were misleading, or that it was misleading not to make those disclosures. So because those claims all do sound in fraud, they are subject to the Rule 9 standard.

THE COURT: So basically across the board here, Rule 9. And I know I'm sure I'll hear from Mr. Keller. My general understanding is that while antitrust allegations may otherwise not be subject to Rule 9 when they're premised on fraud, a lot of courts have then applied Rule 9.

MS. SESSIONS: So, certainly, yes. When the allegations are premised on something like fraud or a misrepresentation, the courts in the Fifth Circuit in particular apply Rule 9 regardless of the underlying law. And so when we're talking about the DTPA claims in particular, a Rule 9 pleading standards applies there.

We're -- just to be clear, we're not arguing that a Rule 9 standard applies to the state antitrust claims.

THE COURT: And what about the relaxed standard issue? Do you have a thought on that and whether that applies here? The cases that I think I've seen has always been False Claims Act cases where that's applied, but, you know, it's government enforcement, and this is a government enforcement action. And we know the Fifth Circuit has also talked about Rule 9 being applied in context-specific manner.

MS. SESSIONS: Yes, and that's right. And I think the Fifth Circuit has directed that Rule 9 always needs to be applied in a context-specific manner.

I agree with Your Honor that the vast majority of the relaxed Rule 9 cases arise in the False Claims Act context, but I recognize that Your Honor did say in the *Gilmore* case that relaxed Rule 9 may apply in other government-enforcement contexts as well.

I don't think that whether a strict or a relaxed Rule 9 standard actually makes a difference in this case, and that's because the relaxed Rule 9 standard, general -- it doesn't excuse the plaintiff from still pleading what was said and how or why what was said was misleading or a material omission. Relaxed Rule 9 tends to come into play when -- again, in the False Claims Act context when a plaintiff may be excused from specifying the exact amount of

every false claim that was submitted, or the precise date on which every one of those claims was submitted.

And here, the failing is much more fundamental than that. And so I don't think that relaxed Rule 9 excuses the plaintiffs from still pleading the basic what was said and why it was false or misleading, which is the basis of our motion to dismiss. So I guess I would say you can apply the relaxed Rule 9 standard and still dismiss these cases -- dismiss the DTPA claims under the relaxed Rule 9 standard.

THE COURT: All right. I think you were going to walk through, I suppose, the various claims here.

MS. SESSIONS: I was. Starting with the what I'll call the auction optimizations, so those are the DTPA claims that relate to reserve price optimization, dynamic revenue share, and project Bernanke. So on each of those optimizations, plaintiffs have an omission argument that Google should have disclosed these optimizations because the optimizations meant that in their view Google was not running a second price auction.

I'll note that the complaint doesn't provide any reason other than expectations about the auction format that Google had any duty to disclose these optimizations, or nothing else that needed to be corrected with respect to these optimizations. And I'll get back to this in a minute. But the omission theory as to dynamic revenue share and

reserve price optimization really doesn't work because documents integral to the complaint demonstrate that Google did, in fact, disclose those optimizations.

But more fundamentally for all three of them, as I said, the plaintiffs don't establish any duty to correct some statement by revealing those optimizations. They don't describe any contemporaneous representation about the nature of Google's auction that would need to be corrected. So, in other words, they don't say at the time dynamic revenue share came out, Google told everybody that its auction worked in some way that is inconsistent with dynamic revenue share.

What they do is they rely on a statement from many, many years earlier, from 2010, that describes Google's auction as a second price auction. And so without contemporaneous statements that might be misleading, if not, you know, corrected by a disclosure of any of these optimizations, that omission-based DTPA claim fails.

And I'll note that the precise details of whatever the representation about the auction format is really matters in this context because, for instance, if the state -- if Google makes a statement that said AdX -- the ad exchange is a second price auction where the winning bidder pays the higher of the second bid or the reserve price, which is how the plaintiffs describe a second price auction at paragraph 529 of their complaint, none of dynamic revenue share,

reserve price optimization, or Bernanke makes that statement false. Under any of those optimizations, as plaintiffs have described them, the auction is still one where the winning bidder pays the higher of the second bid or the reserve price. So without understanding the details of the specific representation that is allegedly made false by a lack of disclosure, we can't assess whether there was any material lack of disclosure at all because the precise details really matter.

So that leaves us with misrepresentation theories with respect to reserve price optimization and dynamic revenue share. And for both of those optimizations, plaintiffs concede that there was some disclosure of those optimizations, and the complaint selectively quotes from those disclosures. But when you read the full actual disclosures that Google made, the key points that plaintiffs seem to have a problem with are contained in those disclosures.

So, for example, reserve price optimization, plaintiffs claim that reserve price optimization was a problem because it used historical data to help publishers set their floors, their price floors. Well, that disclosure that Google made says that reserve price optimization uses historical data. So there was no misrepresentation as to the presence or absence of the use of historical data.

And it's a similar story with dynamic revenue share. Dynamic revenue share, plaintiffs say while Google misled customers because not only could Google decrease its revenue share with dynamic revenue share, but it might also increase its revenue share on some transactions. But again, the disclosure that Google made of that optimization says, We may increase or decrease our revenue share. So again, that key point was disclosed. And so on the points that plaintiff identifies, you know, misleading or deceptive about those optimizations, those were contained in the disclosures that were made.

THE COURT: Well, some of them were a situation where there was some information that was delivered, but the plaintiffs complained because there wasn't enough information disclosed, if you will. And you can tell me if I have something wrong. I just want to use as an example the Bernanke One. And you talked about, you know, the bidder is going to pay the same price.

As I understand the complaint, it's the bidder might pay the same price, but the publisher, you know, is getting that third highest, and then I think Google was putting that difference in a pool or something like that.

So as I understood it, the plaintiffs are saying, well, you didn't reveal that part about the publisher getting that third highest rate. And so -- and perhaps on dynamic

revenue share they might say, well, you didn't say enough about what you were actually going to do in terms of changing, you know, the revenue share. So I would like to get your response to that, because I'm sure I'll hear from Mr. Keller on these points.

MS. SESSIONS: Yes. And thank you, Your Honor. And I'll take the easier one of those two questions first on -- which was your question on dynamic revenue share. I think this is true for dynamic revenue share and for reserve price optimization.

They may say there was something more that we should have disclosed, but they don't identify what that something more should have been. The something more, all right, the reasons that they identify in the complaint were disclosed in those disclosures. So the example of raising or lowering the revenue share. So I suspect that they may come up with a lot of other things that they maybe now would like to have had disclosed about RPO or DRS, but those aren't -- are not identified in the complaint as reasons that those should have been disclosed.

Now, the harder of your questions, which is Bernanke. And I acknowledge that I think their theory is that on the publisher side, that the publishers did not know, as they allege, there was a different price being given to them. The time to dispute their factual allegations about

Bernanke will come down the road because I don't think their description is correct. But taking it on its terms, they still don't allege why that lack of disclosure would have been material to anybody.

And so on the Bernanke omission claim in particular, there is a striking lack of any allegation that anybody would have done anything differently had Bernanke been disclosed, or had that aspect of Bernanke been disclosed to anyone. And, in fact, it's somewhat the -- any allegation of materiality would really be at odds with the premise of their antitrust claims, which is that nobody had any choice but to use these products in the first place. And so if nobody had any choice but to use these products and were using them despite them not wanting to, or not liking how they worked, it's hard to see how any additional disclosure would have been material to anybody's decision whether or not to use the product. And materiality is required in particular for an omission claim. A part of a DTPA omission claim is -- it has to be an omission that would have induced a consumer, you know, to buy the product or use the product when they otherwise would not have.

THE COURT: All right. You can continue.

MS. SESSIONS: Thank you, Your Honor.

The next -- I won't belabor the point. There's another allegation on reserve price optimization about an

article that came out in 2015, but in the interests of time, I think I'll move on to the next category of conduct.

THE COURT: Right. Because I think the argument you've made would apply to the, you know, the reserve price optimization issue, similar to what you said about the dynamic revenue share. Is that fair to say?

MS. SESSIONS: Exactly. Yes, Your Honor.

THE COURT: All right.

MS. SESSIONS: So the next category of conduct relates to header bidding and Google's response to header bidding. And I think there are two kind of theories again that the plaintiffs have here. First, in that opposition brief, they alluded to the Google-Facebook Network Bidding Agreement as relating to their DTPA claims on header bidding. This is not alleged in the header bidding factual section of their DTPA claims, so we didn't think that that was a basis on which they were bringing the header bidding DTPA claim. But even if it were, plaintiffs don't allege or explain why entering into a lawful agreement with a customer could be a misrepresentation or a deceptive omission on the header bidding front. The agreement also comes in when we talk about their equal footing claim, and I'll address that in a moment.

But the second argument on header bidding involves a statement that a New York publisher told to one of Google's

competitors. And that New York publisher said to one of Google's competitors that apparently Google said to that New York publisher the header bidding would be a strain on their servers. Even sort of taking these layers of hearsay at face value, plaintiffs don't plead any facts from which one can infer that the statement that Google allegedly made was false, which is "header bidding would be a strain on your servers." So without an allegation, a header bidding was not, in fact, a strain on this publisher's servers, they really have no DTPA claim based on header bidding.

They try to stretch that one specific statement into some other unidentified misrepresentations; other publishers were led to believe the same thing; or Google repeated this. I would say it still doesn't make it false. They still haven't alleged any facts that would make the statement false, and it's also wildly unspecific. And, you know, you can't infer that a statement was false without actually having someone tell you what that statement was.

So next -- second to the last, we get to the equal footing claim, and these are both -- this is based on two alleged misrepresentations. And as with the other specific statements, it's really crucial to examine what Google actually said and what plaintiffs are taking issue with.

So there are two statements that plaintiffs look to in the equal footing section. One is about the switch in

2019 from a second price auction to a first price auction, and the statement is, "By switching to a single first price auction, we can help reduce complexity and create a fair and transparent market for everyone."

Well, plaintiffs don't dispute that Google did switch to a first price auction. So that part of the statement is true. They seem to take issue with the statement because they don't believe that Google's auction comported with their notions of fairness or transparency. But their opinions about sort of fairness and transparency in the abstract don't make that particular statement actionable.

First of all, they utterly fail to explain how the statement "we can help reduce complexity and create a fair and transparent market for everyone" is material at all, or how it could be false, because it's not a particular represent -- it's not a representation that any particular auction comports with any particular mechanics or is run in any particular way. It's really a general statement.

THE COURT: I think you made the argument in your brief, too, that this, you know, at what point are you running into more of an opinion versus something that's being stated as a fact.

MS. SESSIONS: Absolutely.

THE COURT: I think I saw that in your briefing.

MS. SESSIONS: Yes. Yes, that's right. And

statements of opinion or, sometimes as the courts say, puffery is not actionable because it's really not falsifiable, it's a statement of opinion.

And so "we can help reduce complexity and create a fair and transparent market" is --

THE COURT: But did they have another piece of that that had to do with everyone is competing on the same -- something like that?

MS. SESSIONS: Yes, Your Honor, they do. The next statement that they take issue with is -- and it was selectively quoted in the complaint, but a more -- and we've reproduced the entire statement for Your Honor in the exhibits to the brief. But a more complete version of the statement is "All participants in the unified auction, including ad exchanges and third-party exchanges, compete equally for each impression on a net basis."

And the part of the statement that was left out in the complaint is "on a net basis." And so plaintiffs wanted to say, well, this is a representation that everybody in the auction is on equal footing in every, you know, sort of conceivable way. But that's not -- the statement said -- the statement is about how the bids are compared in an auction, and they're compared on a net basis. And none of the things that the plaintiffs complain about in the equal footing section makes that specific statement false or misleading.

They don't -- there's no optimization that means that the bids are not being compared on a net basis in the auction. They have some other problems, and they say Facebook had special advantages in the auction; they had a longer time out; or Google had more information than some other folks. But that doesn't make the statement "that everybody is competing equally for each impression on a net basis" false.

THE COURT: And that part of that sentence that you've been talking about, "on a net basis," what is -- and I'm asking you to be redundant, but what does that part mean, "on a net basis," in the context of that sentence?

MS. SESSIONS: So we talked earlier a little bit about dynamic revenue share.

THE COURT: Right.

MS. SESSIONS: And so in the auction there can be a revenue share that is taken out of the -- in many cases, the advertiser's bid. And so what this is referring to is the bids being compared on a net basis after the revenue share is subtracted from that. So everybody runs their own -- there's more of the statement that actually says every -- all the exchanges are going to run their own auctions; they're going to kind of do whatever it that is they do; they're going to submit their bids into the unified auction; and then the bids in the unified auction are compared on a net basis.

THE COURT: All right. Thank you.

MS. SESSIONS: So the last bucket of allegations is the personal -- the sale of personal information claim. And on this one, the plaintiffs are alleging that Google's privacy policy is deceptive or misleading.

So Google says in its privacy policy that it does not sell user's personal information. In that same privacy policy Google also says that "Information that is recorded about users so that it no longer reflects or references an individually identifiable user may be shared with advertising partners." And that's a long sentence but, right, Google says we don't share your personal information. Google also tells users that there is information that doesn't individually identify a particular user, but, and that sort of information may be shared with advertising partners.

Despite this disclosure in the privacy policy, plaintiffs claim that the policy is misleading -- the statement "we don't sell your personal information" is misleading -- because in the course of digital advertising, Google sends a bid request to bidders and that bid request is somehow a sale of personal information because the bid request contains information in it. And they allege that the bid request contains things like device IDs, user IDs, cookie, and browser information, demographic data, and geolocation information.

So they don't allege that the bid request has a person's name in it or personally identifying information, but they're saying, well, these things that could be in the -- in the bid request, well, they could be linked up by Google with some other personal information; therefore, it's personal information; therefore, it's misleading.

THE COURT: Is it -- and I want to -- I'm going to try to break this down for a layperson of where Google is at on this. And here's what I think I understand, because I think part of this is to the extent that data is being shared for an advertiser to be able to do a targeted ad, that the -- as I understand it, the data that Google is providing is here is a person that there's data that would show this kind of ad might be, you know, appropriate for this person. But what you're not sharing is anything about the person's name, or where they live, or anything else like that, but it is specific to that particular user of the data -- the data is so that the advertiser may figure out an ad to send them. And, I don't know, do I have that right or wrong?

MS. SESSIONS: So I think without making a representation about what is in any particular bid request that Google might send, because that's not at issue right here, right, what they say is in this bid request are things like a device ID, which could identify a particular -- a device, like it's associated with a device; or a user ID,

which is a bunch of numbers that could correspond to a user, but it doesn't identify a specific user; and then cookie and browser information; demographic data; geolocation information, that all could be associated with, you know, a person who is viewing or associated with the -- these sort of impression that the viewing --

THE COURT: Right.

MS. SESSIONS: -- of that page, but it doesn't -- they're not saying that the person's name or their address, or anything, that individually identifies that where they could say, oh, Ms. Sessions is viewing this advertising request -- they're not saying that that -- they don't allege that that's in the bid request.

THE COURT: Right. But the cookie and browser information would be information about that individual, I suppose, where -- what they were viewing on the internet; right?

MS. SESSIONS: It would be -- it could be information about what that device had been doing on the internet.

THE COURT: Right.

MS. SESSIONS: Yes. But it's not -- it doesn't tie to an individually identifiable -- it doesn't allow the recipient to individually identify any user, which is the real distinction here because in the privacy policy Google

says, right, information that's recorded about users so that it no longer reflects or references an individually identifiable user might be shared as a part of advertising.

So in light of the entirety of the privacy policy, it can't be misleading to say, Oh, well, Google does send some of this anonymized information, as they allege, in the bid request. And the second portion of that is that they also don't allege that the bid request is a sale. They -- for their theory to work, the bid request would also have to be a sale of the information that is in there. And the bid -- Google doesn't receive, right, a price from anybody for sending the bid request. It simply isn't a sale. They say, well, Google, down the road, might make money if one of Google's advertisers gets that bid request and sends the winning bid, and, you know, Google makes money off of that transaction. But that's not the same as the bid request itself being a sale.

So I'm glad to take any questions that Your Honor has. That was my run-through on the DTPA claims, but I'll -- I'm happy to sit down, also.

THE COURT: Well, I think this is not -- this has to do with the tolling issue, the statute of limitations issue. It's really, I think at least at the moment, the only other thing I was going to ask you about --

MS. SESSIONS: Certainly.

THE COURT: -- is the parties have obviously disagreements about this. And I would like to get your understanding of whether or why some sort of tolling or like provision might not apply here writ large. And I would like to get just Google's position on that, because the States obviously have noted that they believe a number of different doctrines would apply to these statutes of limitation. So maybe you can --

MS. SESSIONS: Certainly. And I'll try to keep it kind of big picture for as applicable generally to the States where the statute of limitations applies.

The first thing is there are no pleaded facts that would support application of the tolling doctrines. And so in particular, in instances of a misrepresentation -- of an alleged misrepresentation where the statement was actually out there and made, and folks were presumably aware of it, there has to be pleaded some facts that would support application of a tolling doctrine to toll the statute of limitations beyond the date of the alleged misrepresentation.

Now, some -- there's been some invocation of doctrines like continuing violation. And again, in a case of a misrepresentation, a misrepresent -- there is a distinction between the act itself and then sort of continuing effects of that act, which is different than repeating the act over, and over, and over again, which wouldn't necessarily be a

continuing violation, but would be a new violation every time an alleged misstatement was made. But in the case of a single alleged misstatement, that's not a continuing violation, even though there might be continuing effects from that alleged misrepresentation.

The only other point I'll make on tolling kind of writ large is usually tolling doctrines come into play when the -- when either the injury is very difficult to -- where the injury is difficult to detect or doesn't become apparent until much later, or the violation itself is quite difficult to detect.

In this case, we're not dealing with consumer claims or with private claims where the plaintiffs have to prove that they suffered any injury. And we're also not dealing with plaintiffs that don't have the power of investigation. And so on the tolling doctrines, I would say, you know, the State Plaintiffs' zeal to tell you that they don't have to prove reliance for injury, or any of the other elements of perhaps a private DTPA claim, really means that tolling also should not apply because the violation occurred and was sort of complete, for their purposes, at the time of the alleged misrepresentation. And again, they have investigatory powers at their disposal, and haven't pleaded any reason that, in the exercise of diligence, that they couldn't have discovered these claims earlier.

I'll note, right, continuing violations, discovery rule, a lot of those tolling doctrines have to be applied on a state-by-state basis -- and you have been provided appendices sort of detailing those -- so not every state could benefit even from, for instance, the discovery rule, but I had to keep it a little bit bigger picture.

THE COURT: All right. Thank you, Ms. Sessions.

I'll hear from Mr. Keller.

MR. KELLER: Good afternoon again, Your Honor. May it please the Court. Ashley Keller for the Plaintiff States.

I'll make two prefatory comments, one legal, one thematic, and then I will also march through each of the DTPA theories, unless you want to repurpose me into other secondary or tertiary issues.

So the first prefatory remark is the legal one on Rule 9. I think I agree with my friend from the other side that this is largely not controlling. You saw some of the precedent that says you can apply a relaxed Rule 9 where sovereigns are in play. A lot of these DTPA statutes don't have fraud or mistake as a necessary element; they prohibit only unfair or unconscionable practices.

But the real teeth behind Rule 9 is typically on the reliance prong. And you just heard my friend on the other side concede under cases like *Holzman*, and there are many others, when sovereigns are bringing these DTPA

enforcement actions, they don't have to prove reliance. And if we don't have to prove reliance, of course, we don't have to plead reliance. So there's no necessary Rule 9, Tell me the specific consumer transaction where this consumer was conceived into doing something; we don't have to establish that.

Another thing that you typically see in these DTPA cases, and I think you brought this up at a previous status conference, is some of them have scienter as an element. I would point to Texas's subsection (b)(24) as an omission example of where Google's intent becomes relevant where Rule 9 is expressed on its terms. Intent is something that we can plead generally; and generally, under *Ashcroft v. Iqbal*, means complying with Rule 8. So Rule 9 is essentially cross-referencing the regular pleading standard where you draw all these other inferences in our favor, and we just have to have a short and plain statement of the claim showing that the pleader is entitled to relief on that element of scienter. So I actually don't think that the Rule 9 discussion is all that controlling despite both sides admittedly spilling some ink on it in our papers.

Let me make the prefatory thematic point that I think is going to undergird a lot of what we talked about here for the DTPA theories that the States allege, and that is I hope the common sense intuition that the rules of an

auction matter a lot to the auction participants. And the reason for that is well studied in the economic literature that there are lots of different ways to run an auction. There is no necessary right way or wrong way, but those different rules impact strategic behavior because, let's face it, the sellers and the buyers want different things.

The buyers want to buy the item at the auction block for the lowest possible price. The sellers want to sell their items for the highest possible price. And if they know the rules of the road, if they know what Christie's and Sotheby's are going to do when they're selling their items, they're going to modify their behavior strategically to achieve their own objectives.

If you secretly change the rules or tell half-truths about the rules of the auctions that you're running, that's going to be unfair, that's going to be deceptive; that's going to be exactly the sort of omissions that are the heartland of the transactions that these DTPA statutes are designed to police. And so with that thematic point in view, let's talk -- Oh, I'm sorry. Go ahead.

THE COURT: Let me ask you a question about that, because it's a point your friend on the other side made which was that if part of the theory is these people really didn't have a choice but to participate in these auctions, I think the argument was it wouldn't have mattered if they knew or

not.

MR. KELLER: Yeah. Two responses to that, Your Honor. First, we have attempted monopolization claims. And so obviously, with respect to those, Google didn't have a monopoly yet, and the consumers -- I'm defining "consumers" the way these statutes do, of course, which includes business entities like advertisers and publishers, so they potentially could have changed their behavior.

The second point I would make with respect to that is Google obviously disputes that they had a monopoly. And we're allowed to plead things in the alternative. I think we're going to win, but to the extent we don't ultimately prevail on our monopolization claims, that's not dispositive to whether they were engaged in deceptive behavior.

And I think our third point is, legally it's not relevant under most of these statutes whether the consumers would have ultimately changed their behavior. If Google intended to deceive them in order to induce the transaction, that's enough irrespective of whether they would have ultimately been able to go to a different product or service because of Google's monopoly power.

And the final point I would make is change can sometimes be in the eye of the beholder. But even if Google had a monopoly, it is quite possible that publishers and advertisers still would have had to transact with Google, but

they would have changed their behavior. They might have bid in a different way and deployed different strategies as they were doing prior to the rollout of some of these things.

So for all of those reasons, certainly on a 12(b)(6), construing all of the allegations and plausible inferences in our favor, I don't think my friend on the other side's point carries the day.

Let me talk about reserve price optimization and how that deceived advertisers in particular. A rule of an auction that's really important for auction participants to know is whether there's going to be a reserve price. This is a completely common feature in auctions. It's a price below which the item can't transact. If Your Honor were a collector of beautiful artwork and you were selling a Rembrandt at Sotheby's, you would be allowed to tell Sotheby's, "No less than $10 million. You can start the bidding anywhere you want, but the hammer cannot fall on this auction item for less than $10 million." And the people who are bidding know that that's the rules of the auction house. The seller has the right to set a reserve price below which the item cannot transact.

What Google did is it used its treasure trove of data that it had because of its monopolies on advertisers to change the publisher's reserve price so that the publishers could receive more for that item at the auction block.

Now, a year after Google did this, they disclosed on a blog post, "We look at historical data in order to set the reserve price." And what this illustrates I think, Your Honor, is that oftentimes deceptive parties are trafficking in half-truths. Yes, they did disclose that they were using historical data to set a reserve price. What they didn't disclose, as the complaint states -- you can look at paragraphs 532 and 537 for this -- is they were using historical data to set a unique reserve price for each advertiser. So the minimum price for you as a bidder is $10 million. But we know you like Rembrandt a lot. You're going to pay more. Your minimum price is $15 million. And up and down the line.

That is a unique form of price discrimination that completely eviscerates the concept of a reserve price. It's not a reserve price anymore, it's multiple different reservation prices that Google is setting for these advertisers. That is obviously deceptive. That is obviously something that Google intended to omit from telling the advertisers to induce these transactions, and Google admitted it internally. In those paragraphs that I just referenced, Google says, "This blows up the concept of a second price auction." But they weren't willing to tell that to the actual auction participants.

Let's look at dynamic revenue share where I think

the story is the same. Here's a rule that's really important to participants in an auction. What is the auctioneer's commission? How much do they charge? Does Sotheby's get 10 percent, 20 percent, or 30 percent when they sell the Rembrandt? People need to know that because obviously the middleman's take is not going into the seller's pocket and is something that the buyer ultimately is going to have to pay in a competitive auction.

What dynamic revenue share did is it involved Google again utilizing its monopolistic power to be able to see all of the bids that were coming in from rival exchanges to dynamically adjust its commission. Sometimes they would lower their commission to let's say 10 percent instead of 20 percent in order to win that transaction. And sometimes, when they knew they could get away with it, they raised it to 30 percent. This was deceptive in two different ways. The first one is more intuitive. If you're the publisher selling your inventory through Google's exchange, you obviously don't mind paying 10 percent instead of 20 percent, but you definitely care about paying 30 percent. Google can say it all came out in the wash. But for the publisher who had to pay 30 percent instead of 10 percent, the fact that a different publisher paid 10 percent and on average it worked out to 20 percent, is no consolation to that publisher; they paid a higher commission in order to transact.

But the other way that this was deceptive -- because again Google says, "We disclosed this; we said that we might dynamically adjust our commission" -- what they didn't disclose is they were adjusting their commission not based on historical data. Then let's say based on our algorithm, we think for this auction we've got to lower it to 10, and for this auction we've can to raise it to 30 and get away with it. They were peeking at all the rival bids from the other exchanges, from the competitors who were trying to efficiently compete with Google and submit the best bids for auction inventory. And only after seeing what the other competitors were doing did Google change its commission knowing that that was going to ensure that they won the transaction that their auction exchange would be the one that transacted.

That's deceptive actually to both sides of the transaction, advertisers and publishers, and the reason is it creates a false impression about the efficiency of Google's products. If everybody thinks, look, Google's just the one winning all of these auctions because they've got the best service, they've got the best technology, they're adjusting their commission based on their superior technological prowess, that's one thing.

If Google's using its monopoly over publisher and advertising servers and saying, "We know that we didn't

actually produce the best bids for this auction item, so let's lower our commission," the rival exchange doesn't know that Google is doing that; the publishers and advertisers don't know that Google is doing that, that's the deception that Google was creating through dynamic revenue share.

I think Project Bernanke is actually the easiest one. You know, the technology here is complicated, obviously, but the concept behind Project Bernanke is very easy to see as deceptive under state law. You essentially have Google going all the way back to 2010 saying that they're running a sealed second price auction. And everybody knows what that means. That means that the second highest bid is the one that's going to win the auction. The bidder is going to pay that second price and, less Google's commission, it's going to go to the publisher.

And what Google decided to do unilaterally without telling anybody this, "We're going to charge the second price to the advertiser and we're going to give the publisher the third price, and we're going to put the difference in some pool that we're going to use to juice the bids of people that are using our advertising products to help advertisers bid on exchanges."

Google's not allowed to create a secret slush fund and essentially say the rules of the auction are completely different than all of the auction participants previously

thought, and advertisers are going to pay one price, and publishers are going to get a lower price. That's obviously deceptive. It's obviously an omission that was intended to induce these transactions. And there's a reason Google never told anybody about it. It's because they knew that both publishers and advertisers would be up in arms if they found out about Project Bernanke.

Let's talk about equal footing. Another thing that's really important to auction participants is that we're all going to be competing on a level playing field. Sellers and buyers are going to be able to bid on an exchange. We're going to understand how the price inputs are going to work. And again, there are different ways that we can all be on equal footing.

If you want to go back to a game show that I used to watch as a kid, *Let's Make a Deal*, if Monty Hall says, "Do you want to bid behind" -- "Do you want to bid on what's behind door number one?" and it might be the Rembrandt we were talking about, or it might be a chicken, and you'll find out after you bid, people would be willing to bid on that. There's a chance it's a Rembrandt, so they're going to put in a significant bid recognizing that there's a chance that it's a chicken, and they're going to be pretty disappointed when the door opens.

It's a very different thing if Facebook has special

information advantages and knows that it's a Rembrandt behind door number one, or has longer to bid. And Google is feeding them this information, as the complaint documents, for the specific purpose for helping them in their efforts to control the markets that they have a monopoly in, and to destroy header bidding.

And so if you're participating in an auction where Google says, "Everybody's on the same footing," and you've got this behemoth -- a Fortune 100, a Fortune 10 -- company that's getting special information advantages, it's no longer true to say people are competing on equal footing. And to my mind, the notion that that's just puffery, that's like a car salesman saying, you know, this is a really shiny new car and people will be impressed by it, that's just a false statement. It's not true that everybody's competing on an equal footing. It's not gloss. It's not an opinion. It's something that every auction participant, again, would be up in arms about.

THE COURT: Well, let me ask you, because your colleague on the other side made the point of the portion of the statement that talks about being on a net basis. And I would like to get your comment on that.

MR. KELLER: I certainly don't see how the net basis gloss does anything to undermine how anybody else would read that statement. Certainly, again taking the

well-pleaded factual allegations as true and drawing inferences in our favor, I don't think anybody would say, Oh well, they qualified it by "on a net basis," so that must mean it's possible someone else like Facebook has special information about whether it's a Rembrandt or a chicken. I don't think that basis can carry that load.

So when I saw them saying we didn't completely quote the statement, I was concerned. But when they threw the rest in, I sort of shrugged my shoulders and said I don't see why that undermines any of the DTPA theories that we have here, that the basic thrust of the theory is they were secretly giving information and advantages to one of the largest participants in these auctions while inducing everybody else to keep participating, and saying it was equal footing. "Net basis" I don't think does very much to that, certainly on the face of the complaint.

Let's talk about user ID and privacy policy, which is a little bit of a fog relative to the auction rules, but obviously the consumers who are using Google are the ultimate recipients of these auctions.

We all agree on the privacy policy and what the privacy policy says and how it defines personal information. What the complaint alleges -- you can look at paragraphs 572 through 573, 578, 582, and 584, is, yeah, Google anonymized the information, and so it didn't just publish a user's email

address, which is defined as personal information, but then it gave the advertisers the decoder ring. And so it anonymized it, but then it knew that everybody participating in its auctions was able to de-anonymize it and figure out exactly not just your user history and which websites you had gone to, which is obviously useful information for an advertiser, but who you are in particular.

They can fight those well-pleaded factual allegations at a later posture, they can say that's not actually what we did, but that's what we plead. And so based on what we've pled, they've clearly violated their own privacy policy and in a deceptive way, in a way where consumers -- you know, the jury that will ultimately be impaneled to hear this, they're perfectly capable of reading the privacy policy. It's supposed to adhere to people like them. They're going to be able to look at it and say, "Yeah, that was deceptive. I didn't realize that you were actually putting out information into these auctions where the advertisers could figure out exactly who we are."

With respect to header bidding, Your Honor, this was obviously something that was a focus of the antitrust allegations. We respect Judge Castel's decision, even the portions we disagree with. We're not fighting it for purposes of the DTPA claims. You know, it's admittedly not as clear-cut as the others. But I still think that there was

deception when they are essentially telling parties not to use header bidding because it's going to strain the load of your servers, as opposed to the real and true reason, which is, "This is a competitive threat and we're going to do everything in our power to squelch it."

THE COURT: Is it accurate to say that the only statement to that effect mentioned is the one to the individual in New York; is that correct? It is just that one incident?

MR. KELLER: Paragraph 568 is the one that contains that statement. Obviously, the complaint was written at a different time compared to all of the fact discovery that we've received. And so that statement, this is the one area, again I'm being honest with the Court, where I think a relaxed Rule 9(b) might be more relevant. With respect to all of the other things that we have just talked about, I actually don't think it controls, but this is one area where it might be something that's pertinent.

I've run through the different theories. I do want to talk about the statute of limitations because you asked my friend on the other side about that. Let's deal with the easy part. It would be unconstitutional to apply the statute of limitations against Mississippi. And there's clear dispositive case law saying the same thing, but not constitutional, but the statute of limitations doesn't apply

to the sovereigns if you're Texas or Louisiana. So that's off the board.

THE COURT: I think that's not disputed as to those states; is that right?

MS. SESSIONS: That's correct, Your Honor.

THE COURT: All right. I think those states, that's not disputed and it just doesn't apply to them.

MR. KELLER: Just wanted to make sure that I got it in.

With respect to the other states, I think there is a respectful disagreement between our sides as to who bears the burden to plead what. Rule 8 is very clear, the statute of limitation is an affirmative defense. That means the burden of persuasion and production should be on the other side. We have to plead ourselves out of court, effectively, in order for us to lose on the pleadings for a 12(b)(6).

But beyond that, I think you heard my friend on the other said say, well, the statements are all out there, and we're sophisticated parties, and so we could have figured this out. Yeah, we are sophisticated parties. We're the sovereign States. And the ultimate parties that were deceived here are largely businesses, not flesh-and-blood people. But not every business is a behemoth business that has the flexibility, the financial wherewithal, and the sophistication to go figure this stuff out. But even if you

are a sophisticated party, Google wasn't telling the whole truth. That's the nature of these allegations. They're of course entitled to dispute that. But accepting the complaint as true, it was really hard to figure out that Google was deceiving folks.

So even with a high level of sophistication, I don't see why things like the discovery rule and the continuing violation doctrines in the states that recognize those theories wouldn't apply, again recognizing we're here on the pleadings. Summary judgment is a different kettle of fish. You know, disputed facts can then be put into the record after the close of discovery, which Your Honor knows is coming right up. But for purposes of just a pleading document, I think we're healthily past the line to say we can't rule on this as a dispositive matter here today.

THE COURT: All right. Thank you, Mr. Keller. I think you hit on the questions as you went along that I had for you.

MR. KELLER: Thank you, Your Honor.

THE COURT: All right.

Ms. Sessions, rebuttal?

MS. SESSIONS: Thank you, Your Honor. I'll respond first on the Rule 9 point, and then run through the -- a couple of the conduct arguments.

So on the Rule 9 point, I think we still -- I agree

that strict Rule 9 or relaxed Rule 9 probably doesn't make a significant difference, but it is our position that Rule 9 does apply here. And Rule 9 applies notwithstanding the fact that the plaintiffs don't need to plead reliance in this case. *Elson v. Black*, which is a 2023 Fifth Circuit case, applies Rule 9 to allegations of untrue or misleading statements, representations, and omissions, not notwithstanding the fact that that underlying -- the New York law that was at issue in that case did not require reliance. So I think the law is clear in the Fifth Circuit that Rule 9 applies to averments of fraud whether or not they are part of a traditional fraud claim that would also require reliance.

And then on relaxed Rule 9, if some relaxed standard applies, it may allow again for some flexibility as to the when and perhaps the where and sometimes the who of the allegedly deceptive or misleading acts, but not the specific what and not the how; that's still required, even under a relaxed Rule 9 standard.

On to the sort of DTPA merits issues. I heard a lot about Google's secretly changing the rules and that mattering to publishers or to advertisers. That highlights the fundamental problem with their pleading, which is they don't establish kind of a predicate baseline. What were the rule -- they say it would be important, you know, to auction participants to sort of know this or that. But what -- they

don't say what we were telling auction participants about the rules of the auction at the time that these statements were made. So while they say it would be -- it would sort of be important, they don't put -- they don't ground that in any representations of Google or any statements about how our auction was being run at the time.

And then very briefly on some of the specific conduct allegations. I heard a number of things that I don't think are present in the complaint, and I just wanted to highlight those for Your Honor. So on RPO, I heard that now the problem is that the price was unique for each advertiser, not that we used historical information because that was disclosed. And I don't see the allegation that the fact that the price was unique for each advertiser -- I don't see an allegation that was material, that that would have been material, or that advertisers would have changed their bidding behavior had they known that, that particular fact.

DRS, dynamic revenue share. I heard that Google should have disclosed what my colleague described as the peeking at the bids. That's not what the complaint says in paragraphs 543 to 547.

And then again personal information. I heard about Google giving the decoder ring to advertisers so that they could I guess decode the information in the bid request. Again, I don't see -- I don't see that allegation in that

portion of the complaint in paragraphs 582 to 585.

And so I would just encourage Your Honor to, when you're thinking about these issues, look carefully at the complaint because we can only respond to the allegations of misrepresentations and omissions that are actually pleaded in the complaint, and can't sit up here and play Whac-a-Mole with allegations that haven't been made or weren't clearly made. And that's part of the reason why a Rule 9 is the standard that applies when we're being accused of fraud or misrepresentation.

THE COURT: I want to make sure that I understand the argument I think you were just making about, I guess, the way it sounds like you're framing it is sort of what is the baseline expectation that somebody has. So, you know, whether it's the reserve price optimization or dynamic revenue sharing, your point would be there is nothing in the complaint to show that the people participating or entities participating had a different understanding or had some particular understanding of the way that the auction was going to go that did not include that information. Is that your point?

MS. SESSIONS: Basically, Your Honor, yes. Without some identification of the representations that Google was making to folks at the time about how the auction worked, how can you say that the failure to include this or that detail

was misleading? Because they haven't established the absence of this or that detail was a part of anybody's baseline understanding of how the auction worked.

THE COURT: All right. I have a feeling Mr. Keller is going to want to say more. You know, let me -- in that context, though, a lot of this talk is about the reserve price and what expectations would be about the setting of the reserve price. How do you respond to the notion of, well, people are just going to expect that, you know, that the reserve price is just going to be set, it's not going to move?

MS. SESSIONS: I -- well, I don't think that's pleaded, and I think that that's inconsistent with the facts. So the complaint does acknowledge that prior to Google's reserve price optimization, that publishers were setting reserve prices. And so it is not as if Google invented the idea of a reserve price and introduced it into the auction with reserved price optimization. This was a better way, a better tool, for publishers to set their reserve prices. But this was going on prior to Google's reserve price optimization.

And, in fact, one of the documents that the plaintiffs cite, which they characterize as a discussion of this undermining the idea of first price auctions, is, in fact, a discussion of publishers on their own setting

increasingly higher reserve prices on transactions, which is a practice that was called "soft flooring" where publishers were kind of trying to fish for a better -- you know, fish for the best price that they could.

So all of that is not -- you know, it's in a document that's integral to the complaint, but my point here is that the complaint doesn't say that this introduction of reserve prices was some new and shocking thing and, in fact, acknowledges that publishers were setting reserve prices in auctions prior to Google's introduction of reserve price optimization.

THE COURT: All right.

MS. SESSIONS: Thank you, Your Honor.

THE COURT: Thank you, Ms. Sessions.

Mr. Keller, I don't know if you want to respond. I had one thing I wanted to touch base with you on here, and I say touch base on that Rule 9(b) application. And I think I meant to visit with you on this before. There is a very recent Fifth Circuit case, literally March 21st, *Kumar v. Panera Bread Company*, and it's just one where the Fifth Circuit, in the specific context of the Texas DTPA, it's just saying in federal court a complaint alleging violations of the DTPA is subject to the requirements of Federal Rule 9(b), which requires fraud be pleaded with particularity. That decision also notes, however, that Rule 9(b)'s ultimate

meaning is context specific, which we've said. And also says, "Likewise, we are mindful that Rule 9(b) does not supplant Rule 8(a)'s notice pleading, which requires only enough facts to state a claim on relief that is plausible on its face."

So it's an articulate -- it's citing to some prior Fifth Circuit cases that I'm sure both sides have seen, but it's basically saying Rule 9(b) is generally going to apply to these cases, meaning pleading with particularity, but with the caveats that I think both sides have recognized.

MR. KELLER: Yeah. On that case in particular, I hate being at the lectern saying I haven't seen that case. As you noted, it was recent. But I think I agree with all of the things you articulated. And of course, even if I didn't, I would be bound to agree by it with what the Fifth Circuit has told you to do.

None of that I think is inconsistent with what we've been sort of discussing, and the fact that it's possible there can be a relaxed Rule 9(b) in a certain context like sovereign enforcement. But for the most part, I don't think the relaxation does very much. I think we get there just on the points of disagreement that you've heard from both sides. We're pointing to the specific things that we think were deceptive, and they're essentially responding, well, they weren't because people knew about it, or it

wouldn't have been material, or it wouldn't have changed behavior. So it's not like they don't know the theory of what counts as deceptive or an omission that we say is actionable. It's just they don't think that it actually rises to the statutory standards.

THE COURT: Right. I think both sides are pretty much on the same page on these standards. And we have, obviously, recent precedent from the Fifth Circuit that's confirming I think these principles. But I assume you may want to comment on what you just heard from your friend on the other side.

MR. KELLER: Yeah. When I first started hearing my friend on the other side, I thought she might have been saying that, for example, we don't plead in the complaint that there is a unique reserve price set for each advertiser. There clearly was. You can look at paragraph 532 to 533 for that. I think what it became clearer to me that my friend on the other side was arguing was, "Yeah, but that wouldn't have been deceptive." Again, taking the pleading standard as we find it and drawing all inferences in our favor, the complaint pleads that starting in 2010, Google said that it was running a reserve second price auction.

The idea that advertisers wouldn't have wanted to know that there wasn't just going to be just one reserve price, but individual reserve prices set for each one of

them, I think that beggars belief. But certainly, on a 12(b)(6), it's not something that you can accept from Google's perspective. You have to draw the inference in our favor. But the whole concept of a reserve price is there's a single one. Once you start setting reserve prices for each bidder who walks into the auction house, that's a completely different kettle of fish.

THE COURT: Is it fair to say from the States' perspective that, you know, if it is put out there this is a second price auction that's running, that that carries a group of expectations with it, and that's your point? And then if things are different than what those I think that the States would say are standard expectations of how that's going to run, where there are divergences from that, that's what you're saying people would have wanted to know.

MR. KELLER: That's absolutely what I'm saying, Your Honor. And they actually try and turn this positive point for us into one that's positive for them. And I don't blame them for trying the jujitsu, but they say, "Oh, well, 2010, that was so long ago, people knew that we had moved on from that." If you go to Sotheby's and Christie's to buy and sell items, and you've been going there for years or decades and they haven't changed their auction rules, your expectation is those are the rules of the auction. They can't just secretly change it and say, "Well, it's been a

couple of years. We reserve the right to optimize things to take money out of your pocket and put it in ours." That's not how any reasonable consumer, defined again the way "a consumer" is defined in these statutes, would be behaving.

THE COURT: All right. Thank you, Mr. Keller.

Ms. Sessions, let me -- I don't know if you have to go all the way back up to the podium. But, well, the discussion I just had with Mr. Keller, I want to make sure from Google's perspective, is it factually accurate to say that what was being made clear from the get-go was this is a second price auction until you changed it to a first price auction; that that was -- that Google's acknowledging this was what was put out there to the participants as your part of a second price auction.

MS. SESSIONS: So, Your Honor, right, there aren't statements beyond 2010 that have been pleaded. However, I would not dispute that Google was running a second price auction until 2019 when it changed to a first price auction. And none of reserve price optimization, or dynamic revenue share, or Bernanke changed the fact that Google was still running a second price auction. My point is it's the details beyond that that are being haggled over at the moment.

And so the representation that the auction is second price in the way that they described it as where the bidder pays either the second -- the next price or the

reserve price, isn't undermined by the existence of any of these optimizations. And that's my point about the subsequent details really, really matter.

THE COURT: And is there anything you want to say about Mr. Keller's point that that term "second price auction" in this context is going to carry these expectations such that those changes that were made -- whether it's dynamic revenue allocation, whether it's reserve price optimization -- are things that the participants would very much want to know because they wouldn't have expected it to be part of that auction? That's the point of Mr. Keller.

MS. SESSIONS: Yes. And I would just respond that there are no facts pleaded in the complaint that would establish anybody's expectations on those points, you know, beyond 2010 or beyond the disclosures that Google made about its auctions.

THE COURT: All right. Thank you, Ms. Sessions.

I think we've covered certainly all the questions that I had. I appreciate counsel, Mr. Mahr, has departed, but I appreciate all of the argument from the parties. It's been very helpful on both motions. Needless to say, we will be working on these and trying to get decisions as timely as we can.

Anything further, Mr. Keller, from the States today? And the reason I raise that is if -- and it may be

Mr. DeRose, but what I mentioned earlier before you all visited the special master was if there's anything that you think we need to take up discovery wise today, you know, while we're here, I'm willing to do it. But it seems like maybe there's not.

Maybe I'm turning to you, Mr. DeRose. Anything else from the States today?

MR. DEROSE: I do not think that there is anything else from the States. Ms. Sessions and Mr. McBride were discussing the Korula deposition and the topics. Our understanding is the Korula deposition will go forward tomorrow, and there will be another date next week. But there are some specifics around the topics and things of that sort. Is that correct?

MS. SESSIONS: Yeah. I think we had a productive conversation. And the deposition is going to go forward tomorrow. And then we're also looking for Mr. Korula's availability to sit for some additional time.

MR. DEROSE: I think we're good, Your Honor.

THE COURT: All right. So nothing further from the States.

So Mr. Yetter, Ms. Sessions, anything further from Google?

MR. YETTER: Nothing, Your Honor. Thank you for all the time and patience for today, and your staff.

THE COURT: It's been an entire day of Texas versus Google.

All right. Again, thank you for your arguments, counsel, they're appreciated.

And we will stand in recess. Thank you.

THE COURT SECURITY OFFICER: All rise.

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